

Commonwealth of Pennsylvania

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OFFICIAL OPINIONS  
OF THE  
**ATTORNEY GENERAL**  
OF  
**Pennsylvania**

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FOR THE YEARS  
**1941 and 1942**

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**CLAUDE T. RENO, Attorney General**

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Compiled by  
**FREDERIC E. RAY**  
Department of Justice  
Harrisburg

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# OFFICIAL OPINIONS

1941 - 1942

OPINION No. 382

*Park Commissions—Salaried and per diem personnel—Appointment and dismissal  
—The Administrative Code of 1929, sections 202, 434-436, 1906, 1811-1813.*

The power and authority to appoint and dismiss employes in the Valley Forge Park Commission, the Washington Crossing Park Commission and the Pennsylvania Park and Harbor Commission of Erie, is in the Secretary of Forests and Waters subject to the approval of the Governor.

DEPARTMENT OF JUSTICE,  
Harrisburg, January 16, 1941.

Honorable G. Albert Stewart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion as to whether the power of the appointment and dismissal of the salaried and per diem personnel working under the Valley Forge Park Commission, the Washington Crossing Park Commission and the Pennsylvania State Park and Harbor Commission of Erie, is in these commissions or in the Secretary of the Department of Forests and Waters.

Section 202 of the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 62, known as The Administrative Code of 1929, reads:

The following boards, commissions, and offices are hereby placed and made departmental administrative boards, commissions, or offices, as the case may be, in the respective administrative departments mentioned in the preceding section, as follows:

\* \* \* \* \*

In the Department of Forests and Waters,

\* \* \* \* \*

Pennsylvania State Park and Harbor Commission of  
Erie,  
Washington Crossing Park Commission,  
Valley Forge Park Commission,

\* \* \* \* \*

Section 434 of the Act of April 9, 1929, supra, 71 P. S. § 144, reads:

The Pennsylvania State Park and Harbor Commission of Erie shall consist of the Secretary of Forests and Waters, the

Secretary of Internal Affairs, the Commissioners of Fisheries, ex-officio, and nine other persons, of whom two shall be appointed by the Council of the City of Erie.

The commission shall annually elect a chairman and a secretary.

\* \* \* \* \*

Section 435 of the Act of April 9, 1929, supra, 71 P. S. § 145, reads:

The Washington Crossing Park Commission shall consist of the Secretary of Forests and Waters, ex-officio, and ten other persons.

The commission shall annually elect a chairman and a secretary.

\* \* \* \* \*

Section 436 of the Act of April 9, 1929, supra, 71 P. S. § 146, reads:

The Valley Forge Park Commission shall consist of the Secretary of Forests and Waters, ex-officio, and thirteen other persons.

The commission shall annually elect a chairman and a secretary.

\* \* \* \* \*

Section 1811 of the Act of April 9, 1929, supra, 71 P. S. § 471, reads:

Subject to any inconsistent provisions in this act contained, the Pennsylvania State Park and Harbor Commission of Erie shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said commission.

Section 1812 of the Act of April 9, 1929, supra, 71 P. S. § 472, reads:

Subject to any inconsistent provisions in this act contained, the Washington Crossing Park Commission shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said commission.

Section 1813 of the Act of April 9, 1929, supra, 71 P. S. § 473, reads:

Subject to any inconsistent provisions in this act contained, the Valley Forge Park Commission shall continue to exercise the powers and perform the duties by law vested in and imposed upon the Commissioners of Valley Forge Park.

Section 1806 of the Act of April 9, 1929, supra, as amended, 71 P. S. § 466, reads:

The Department of Forests and Waters shall have the power, and its duty shall be:

(a) To supervise, maintain, improve, regulate, police, and preserve all parks belonging to the Commonwealth, *except the Pennsylvania State Park at Erie, Washington Crossing Park, Valley Forge Park, and Fort Washington Park.* (Italics ours.)

The Pennsylvania State Park at Erie was established and the Pennsylvania State Park and Harbor Commission of Erie was created by the Act of May 27, 1921, P. L. 1180, 71 P. S. § 1291.

Section 5 of the Act of May 27, 1921, *supra*, 32 P. S. § 921, reads:

The commission shall have power to enter upon and take possession of the lands hereafter dedicated and such other lands as may be acquired under the provisions of this act, and exercise full power to manage, control, protect, maintain, and develop said lands for public park purposes and for the improvement of the harbor of Erie, and to adopt, establish, and enforce all necessary rules and regulations therefor.

The Washington Crossing Park was established, and the Washington Crossing Park Commission was created by the Act of July 25, 1917, P. L. 1209, 32 P. S. § 1081, *et seq.*

Section 4 of the Act of July 25, 1917, *supra*, 32 P. S. § 1084, reads:

The commissioners of the said park, after they shall have secured possession of the said grounds, shall adopt plans for the improvement, preservation, and maintenance thereof, and shall have power to carry the same into execution, and all moneys expended shall be under their supervision; but no contracts shall be made for said improvement unless an appropriation therefor shall have been first made by the Legislature.

The Valley Forge Park was established, and the Valley Forge Park Commission was created by the Act of May 30, 1893, P. L. 183, 32 P. S. § 1041, *et seq.*

Section 4 of the Act of May 30, 1893, *supra*, as amended, 32 P. S. § 1045, reads:

The commissioners of the said park, after they shall have secured possession of the said grounds, shall adopt plans for the *improvement, preservation and maintenance thereof, and shall have power to carry the same into execution; and shall also have power to deputize one or more persons as special constables to maintain order within said park, protect the property from destruction, and make arrests for riots or illegal trespasses; \* \* \** (Italics ours.)

Section 214 of the Act of April 9, 1929, *supra*, 71 P. S. § 74, reads in part:

\* \* \* Except as otherwise provided *in this act*, the heads of the respective administrative departments shall appoint and fix the compensation of such clerks, stenographers, and other assistants, as may be required, for the proper conduct of the work of any *departmental administrative* bodies, boards, *commissions*, or officers, and of any advisory boards or commissions established in their respective departments.

Except as otherwise provided in the Civil Service Act, the number and compensation of all employes appointed under this section shall be subject to approval by the Governor, and, after the Executive Board shall have fixed the standard compensation for any kind, grade, or class of service or employment, the compensation of all persons in that kind, grade, or class, appointed hereunder, shall be fixed in accordance with such standard. As amended 1937, June 24, P. L. 2003, Section 1; 1939, June 6, P. L. 250, Section 5. (*Italics ours.*)

The above provisions place the authority for the appointment of employes of departmental administrative commissions in the heads of the respective administrative departments, subject to any exceptions provided in the Act of April 9, 1929, *supra*. An examination of this act reveals no exceptions involving the departmental commissions mentioned in the request. We have, in fact, heretofore in this opinion, cited all references in the Act of April 9, 1929, *supra*, to the departmental commissions involved in your request. Instances of such exceptions, however, are found in Section 2318 of the Act of April 9, 1929, *supra*, 71 P. S. § 608, wherein the boards of trustees of certain State institutions are given the power to appoint such officers and employes as may be necessary, subject to the approval of the Governor.

This conclusion is consistent with and supported by Informal Opinion No. 564, of this department, dated May 13, 1935, to the Secretary of Forests and Waters, which ruled that the employes of the Washington Crossing Park Commission must be appointed by the Secretary of Forests and Waters.

We are, therefore, of the opinion, that the power and authority to appoint and dismiss employes in the above mentioned departmental administrative commissions is in the Secretary of Forests and Waters, subject to the approval of the Governor.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

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OPINION No. 383

*Closed banking institutions—Secretary of Banking as statutory receiver—Divulgement of information—Section 302 of the Department of Banking Code, Act of May 15, 1933, P. L. 565, construed.*

The provisions of section 302 of the Department of Banking Code do not apply to the Secretary of Banking as receiver of closed institutions, nor to his deputy receivers or other employes of such closed institutions. The Secretary of Banking in his capacity as statutory receiver of a closed institution, may exercise the right vested in an institution by virtue of section 404 C of the Department of Banking Code, to permit divulgement of information contained in the Department of Banking and pertaining to such institutions.

Harrisburg, Pa., January 22, 1941.

Honorable John C. Bell, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have inquired if section 302 of the Department of Banking Code, being the Act of May 15, 1933, P. L. 565, 71 P. S. § 733-302, applies to the Secretary of Banking as statutory receiver of closed institutions, deputy receivers and other employes of such closed institutions.

Section 302 reads as follows:

Section 302. Disclosure of Information Forbidden; Penalty; Exceptions.—A. *Neither the Secretary, nor any deputy, examiner, clerk, or other employe of the Department, shall publish or divulge to anyone any information contained in or ascertained from any examination or investigation made by the Department, or any letter, report, or statement sent to the Department, or any other paper or document in the custody of the Department, except when the publication or divulgement of such information is made by the Department pursuant to the provisions of this act, or of any other law of this Commonwealth, or when the production of such information is required by subpoena or other legal process of a court of competent jurisdiction, or when it is used in prosecutions or other court actions instituted by or on behalf of the Department.*

B. A violation of the provisions of this section by the Secretary, or by any deputy, examiner, clerk, or other employe of the Department, shall be sufficient ground for his removal from office. In addition, the Secretary, deputy, examiner, clerk, or other employe committing such violation shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be subject to imprisonment for a period not exceeding one year, or a fine not exceeding one thousand dollars, or both. (Italics ours.)

The question arises by reason of the fact that the Secretary of Banking as statutory receiver of a closed institution acts in a different capacity than as Secretary of the Department of Banking, that is, he acts in a dual capacity.

The prohibition of section 302, *surpa*, applies to information obtained by the Department of Banking.

Our authority for the proposition that the Secretary of Banking acts in a distinctively different capacity when he takes possession of an institution as statutory receiver, is contained in section 601 of the Department of Banking Act, *supra*. This section reads as follows:

Section 601. Taking Over Possession by Secretary as Receiver.—*Whenever the Department takes possession of the business and property of an institution, the Secretary shall, by operation of law, simultaneously take over such possession from the Department and become receiver of such institution, subject to the provisions of this act. His official title, when thus in possession of the business and property of an institution, shall be receiver of such institution.* (Italics ours.)

In other words, the Secretary as statutory receiver, takes over possession of the institution from the Department and functions under a new official title, namely, receiver of the particular institution.

Section 301, which precedes section 302, prohibits those employed by the Department of Banking, including deputy receivers and other employes of closed institutions, from becoming shareholders, or officers, or employes of an institution, or receiving any money, gift, or credit, or loan therefrom.

It is to be noted that as originally written, section 301 of the act used precisely the same language in enumerating the employes of the Department of Banking who were under the prohibition of section 301, as does section 302 now, no mention, however, of deputy receivers or other employes of the closed institutions being made.

However, in 1935 the legislature saw fit to amend section 301 by adding the words "or a deputy receiver or other employe of the Secretary of Banking as receiver." We do not attach too great importance to this fact but we do suggest its significance.

What we feel to be controlling is the fact that the prohibition contained in section 302 is first upon the Secretary and employes of the Department of Banking, and second the prohibition is against the divulgement of information contained in the Department of Banking. It would seem that section 302 contemplates only open institutions and not closed institutions because it refers only to information contained in the Department of Banking, the department from which the possession of the business and property of the closed institution has been taken by the statutory receiver. It can be appreciated that reasons for protecting records of open banks are more substantial and important than would be reasons for protecting a closed institution. Improper divulgement of information concerning an open institution might result disastrously to that institution.

We find then, that there is no prohibition upon the Secretary of Banking as statutory receiver in the matter of the divulgement of information. What the statutory receiver's policy would be in this respect is solely for him.

It does happen, however, that there are in the Department of Banking many records and much information in the way of reports and other documents which concern closed institutions, these reports and other documents having been filed therein prior to the closing of the institution.

Section 302, *supra*, provides that if the Department of Banking Code or another statute of our Commonwealth permits divulgement of any information, the Secretary of Banking in his discretion may make disclosure. Likewise, he may be subjected to subpoena before a court of competent jurisdiction. Section 404 of the act contains instances where the disclosures are permitted. We call your special attention to subsection C of section 404, which reads as follows:

The Department, on the written request or consent of any institution, authorized in the case of corporations by resolution of its board of directors, or its board of trustees, as the case may be, may furnish to the Federal Reserve Board, to the Federal Reserve Bank of the district in which the place of business of any institution is located, or to any agency or instrumentality of the United States government, or of the Commonwealth of Pennsylvania, any information in its possession relating to such institution.

Of course, it happens that when possession of an institution is taken over, the directors and officers of the institution cease to function. There can, therefore, be no consent or written request by the institution authorized by resolution of its board of directors, to permit the Department of Banking to divulge information to the Federal Reserve Board or other Federal agencies.

By section 701 of the Department of Banking Code, *supra*, it is provided, however, that when the Secretary has taken possession he shall be vested in his official capacity with all the rights, powers and duties of such institution.

We have no difficulty with the proposition, therefore, that if the Secretary in his capacity as statutory receiver of an institution, desires to authorize the Department of Banking, even though it be his own department, to divulge information on file in the Department of Banking concerning a closed institution to a Federal agency, the Secretary may, as statutory receiver, exercise such right and act on behalf of the corporation to consent to the divulgement. The question of whether or not the Secretary as statutory receiver will so act is, of course, a question of policy for him.

It is our opinion, therefore, that: 1. The provisions of section 302 of the Department of Banking Code of May 15, 1933, P. L. 565, 71 P. S. § 733-302, do not apply to the Secretary of Banking as receiver of closed institutions, nor to his deputy receivers and other employes of such closed institutions.

2. The Secretary of Banking in his capacity as statutory receiver of a closed institution, may exercise the right vested in an institution by virtue of section 404 C of the Department of Banking Code, *supra*, to permit divulgement of information contained in the Department of Banking and pertaining to such institutions.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

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OPINION No. 384

*Domestic Mutual Fire Insurance Companies—Licensing of agents—Section 603 of The Insurance Department Act of May 17, 1921, P. L. 789.*

Domestic mutual fire insurance companies which are subject to the act, that is, those not excluded from its operation by section 103, must certify to the Department of Banking the names of all agents and must comply with sections of the act other than section 603. Agents of domestic fire insurance companies are not required to be licensed.

Harrisburg, Pa., January 22, 1941.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested our opinion on the subject of the licensing of agents of domestic mutual fire insurance companies. The suggestion is made that certain domestic mutual fire insurance companies write policies upon a nonassessable basis and that, therefore, such companies are to all intents and purposes the same as any other fire insurance company. The suggestion is also made that domestic mutual fire insurance companies formed since 1921 enjoy no exemption as to the licensing of their agents.

Less than twenty companies and their agents are involved as most domestic mutual fire insurance companies do not write nonassessable policies and as few such companies have been formed since 1921.

We feel, however, that under the present law no distinction can be made between domestic mutual fire insurance companies in the matter of the licensing of their agents regardless of the fact that some such companies write nonassessable policies and others do not write such policies, and regardless of when such companies were formed.

Section 603 of The Insurance Department Act of May 17, 1921, P. L. 789, is the section under which all agents of all insurance companies are licensed. The last sentence of this section reads as follows:

\* \* \* Nothing in this section shall be construed as applying to domestic mutual fire insurance companies.

We feel that the above sentence is controlling. The effect of this is that section 603 is inoperative as to agents of domestic mutual fire insurance companies and that, therefore, these agents need not be licensed.

The above quoted sentence of section 603, which we say is controlling, was a part of said section as written in the 1921 act. That is, it has not come into the act by amendment. It is to be noted that the licensing of certain kinds of insurance agents was required in our Commonwealth by such early acts as those of April 4, 1873, P. L. 20, and May 1, 1876, P. L. 53. The legislature in enacting section 603, therefore, was not approaching a novel situation. Its intent undoubtedly was to exclude the agents of domestic mutual fire insurance companies from the operation of what we might term the licensing section of the act.

There are three factors or circumstances which support a view contra that now expressed and each of these factors has been given consideration. We will review these factors.

The first circumstances which could be advanced contra the opinion expressed herein is that the act itself makes certain domestic mutual fire insurance companies subject to the entire act and makes other such companies subject to only a part thereof. This is accomplished by the pertinent part of section 103 of the act, which reads as follows:

\* \* \* The provisions of this act, excepting sections two hundred and thirteen (213), two hundred and fourteen (214), two hundred and sixteen (216), two hundred and nineteen (219), five hundred and one (501), five hundred and two (502), five hundred and three (503), five hundred and four (504), five hundred and five (505), five hundred and six (506), five hundred and seven (507), five hundred and eight (508), five hundred and nine (509), and five hundred and ten (510) hereof, *shall not apply to domestic mutual fire insurance companies of this Commonwealth, incorporated under special acts of Assembly or under the act of May first, one*

*thousand eight hundred and seventy-six, with unlimited or limited liability to assessment for payment of expenses and of losses and loss adjustments, set forth in the policy contract or in the promissory notes attached to said policy. (Italics ours.)*

The argument is made that the act itself having differentiated domestic mutual fire insurance companies by excluding from most of its provisions only those mutuals which write nonassessable policies and which were created under the old acts, and inasmuch as the companies not excluded are operating on practically the same basis as do stock companies, the "saving" sentence of section 603 above quoted does not refer to all domestic mutual fire insurance companies. But the last sentence of section 603 above quoted plainly provides that section 603 shall not apply to domestic mutual fire insurance companies, and no distinction is drawn between such companies, on any basis.

The second of what we have termed "factors" supporting a contra view is based on the suggestion that the above quoted language which exempts agents of domestic mutual fire insurance companies, appears in only one section of article VI of the act, dealing with the subject of "Agents and Brokers."

By section 601, the first section of article VI, insurance agents are defined as individuals, copartnerships or corporations that solicit risks and collect premiums, and issue or countersign policies, or merely those who solicit risks and collect premiums on behalf of a company, even if authority has not been granted by the company to the agent to issue or countersign policies.

By section 602 of the act, all companies are required to certify from time to time to the Insurance Commissioner the names of all agents appointed by them.

By section 604 of the act anyone who acts as an agent of an insurance company without a license may be found guilty of a misdemeanor.

It is to be noted that the exemption of agents of domestic mutual fire insurance companies appears only in section 603, and it is argued that the act which by section 601 includes as agents anyone who solicits risks, and which by section 602 requires subject insurance companies to certify the names of their agents, and which makes the act of any unlicensed agent soliciting business a misdemeanor, could hardly intend that all agents of all domestic mutual fire insurance companies were exempt from the requirement to obtain licenses. However, there is no irreconcilability here because while agents of subject domestic mutual fire insurance companies are within the act's

definition of agents, and while subject companies must certify all agents' names to the Insurance Commissioner, nevertheless such agents are not required to be licensed, and it is not a misdemeanor for an unlicensed domestic mutual fire insurance company agent to solicit risks.

The third element which has been given consideration in disposing of this problem is the fact that court decisions have recognized a distinction among domestic mutual fire insurance companies.

Two such cases are *Driscoll v. Washington County Fire Ins. Co.*, 110 F. (2d) 485 (C. C. A. 3d, 1940), and *McLaughlin v. Philadelphia Contributionship for Insurance of Houses from Loss by Fire*, 73 F. (2d) 582.

Both of the above cases involve the assessment of taxes by the United States Government under the Federal Revenue Act against the defendant company and the defenses raised were that by provisions of that act such companies were exempted. Clearly, neither case would be in point in the situation covered by this opinion and we, therefore, will neither quote from the opinions of the court nor go into any further detail regarding the facts of the two cases. The language of section 603, as we have continuously pointed out in this opinion, makes no distinction among domestic mutual fire insurance companies and any Federal court rulings on tax matters involving exemptions which may or may not be granted to a particular domestic mutual fire insurance company would be immaterial.

The suggestions which we have disposed of above seem to be based on the assumption that the writing of nonassessable policies alters the mutuality feature of a company. It is to be noted that even some of the older domestic mutual fire insurance companies were authorized to write policies on what was referred to as the "cash plan only." (See *Commonwealth v. Rural Valley Fire Ins. Co.* 41 Dauph. 40, 49 (1935)). It would seem that the essential and primary difference between mutual and stock insurance companies lies in the fact that in the one case policyholders associate themselves together, create management and give form to the company, while in the other case policyholders do not even have a voice in the affairs of the company.

Under these circumstances, therefore, we dismiss factors which tend to support a contra view and adopt the view that agents of all domestic mutual fire insurance companies need not be licensed. We say this in face of the fact that stock companies must annually license thousands of agents. The legislature alone can meet the situation and correct any inequality that might appear to exist in this respect.

It has also been suggested that domestic mutual fire insurance companies organized since 1921 would not be exempt, this suggestion apparently being made for the reason that such companies admittedly are not excluded by section 103. As has been pointed out, however, the last sentence of section 603 permits of no distinction whatsoever in the matter of licensing of agents, and the fact that a domestic mutual fire insurance company can now be organized only under the Insurance Company Law of May 17, 1921, P. L. 682, would be of no importance with respect to the licensing of agents.

It would seem, however, that domestic mutual fire insurance companies which are subject to the act, that is, those not excluded from its operation by section 103, must certify to your department the names of all agents and must comply with sections of the act other than section 603.

It is our opinion, therefore, that agents of domestic mutual fire insurance companies are not required to be licensed by your department.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

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OPINION No. 385

*Public School Employes' Retirement System—Contributors—Withdrawal from retirement system—Accumulated deductions—Payment of interest—Act of July 18, 1917, P. L. 1043, as amended.*

When a contributor to the Public School Employes' Retirement Fund separates from the school service and allows his accumulated deductions to remain to his credit in the annuity savings account he is entitled to regular interest thereon until he demands and is paid from said fund the amount left therein, regardless of whether the date of demand and payment is more than five years from the date of his separation.

Harrisburg, Pa., February 10, 1941.

Honorable Warren R. Roberts, Auditor General, Harrisburg; Pennsylvania.

Sir: This department is in receipt of your communication of November 19, 1940, wherein you request to be advised whether, under the

Act of July 18, 1917, P. L. 1043, as amended, 24 P. S. § 2081 et seq., a contributor should, after separation from the school service, be allowed interest on his accumulated deductions to the time of his withdrawal from the retirement system or for a fixed period of five years from the date of his separation from the school service,

The Act of July 18, 1917, *supra*, establishes a Public School Employes' Retirement System to be administered by the Public School Employes' Retirement Board. A contributor is any person who has accumulated deductions in the fund created by the act to the credit of the annuity savings account. Accumulated deductions are the total of the amounts deducted from the salary of the contributor and paid into the fund to the credit of the annuity savings account, together with the regular interest thereon. Regular interest means interest at four per centum per annum, compounded annually. A beneficiary is any person in receipt of a retirement allowance or other benefits provided by the act. School service means any service as an employe of State normal schools, now known as State teachers' colleges, the Department of Public Instruction, State Council of Education, or the public schools of the Commonwealth.

Section 12, paragraph 1 of the act, as amended, 24 P. S. § 2125, is as follows:

Should a contributor, by resignation or dismissal, or in any other way than by death or retirement, separate from the school service, or should such contributor legally withdraw from the retirement system, he or she shall be paid on demand, from the fund created by this act: (a) the full amount of the accumulated deductions standing to his or her individual credit in the annuity savings account, or, in lieu thereof, should he or she so elect, (b) an annuity or a deferred annuity, which shall be the actuarial equivalent of said accumulated deductions. His or her membership in the retirement association shall thereupon cease.

It will be noted from the foregoing that a contributor's membership in the retirement association, which includes employes making contributions to the fund set up by the act, ceases upon such contributor's separation from the school service accompanied by (a) his demand for and receipt of the full amount of accumulated deductions standing to his credit in the annuity savings account, or (b) his demand for and receipt of an annuity or deferred annuity. That is to say, when a contributor resigns or is dismissed from the school service he may elect to receive an annuity or a deferred annuity or in lieu thereof, may demand and receive the full amount of accumulated deductions standing to his credit.

The question with which we are faced is this: How long is a retiring contributor entitled to receive interest on his accumulated deductions if he elects to demand the same instead of an annuity or a deferred annuity?

The answer to this problem must be found within the provisions of section 6 of the act, as amended, 24 P. S. § 2102, which is as follows:

A. The retirement board shall annually allow regular interest on the mean amount for the preceding year to the credit of each of the accounts created in accordance with the provisions of this act. The amount so allowed shall be annually credited thereto by the retirement board.

B. The retirement board shall annually credit to the State Annuity Reserve Account Number Two all interest on the investments of the fund created by this act in excess of four per centum and the expenses of administration, as determined in the manner provided in this act.

There is nothing in the foregoing section 6 of the act which limits the payment of interest upon the amounts credited to a contributor to a definite period of time. On the other hand, it is clear from a reading of section 12 of the act, *supra*, that if the contributor demands and receives the accumulated deductions standing to his credit at any time, he would receive also any interest thereon to his credit. This interest is to be calculated annually, in accordance with section 6, on the mean amount for the preceding year, and such interest shall be credited annually. It would seem to follow that if less than a year has elapsed since the last annual crediting of interest to a contributor's account was made, at the time of his withdrawal, the withdrawing contributor would receive no further interest. This would be in accord with prevalent banking practice, where depositors who have savings accounts are usually credited with interest at stated times, and are allowed no interest for fractions of interest periods upon funds withdrawn in between interest dates. Although interest periods in savings institutions are usually six months apart, section 6 of the act here involved expressly states that interest is to be allowed annually and credited annually. Hence, under the act, interest periods would run from year to year. Furthermore, under section 1 of the act, as amended, 24 P. S. § 2081, as hereinbefore stated, regular interest is defined as interest at four percent per annum, compounded annually.

Under paragraph 2 of section 12 of the act, as amended, 24 P. S. § 2126, it is provided that if an employe who separates from the school service returns thereto within five years and restores to the School Employes' Retirement Fund, to the credit of the annuity savings account, his accumulated deductions as they were at the time of his separation, the annuity rights forfeited by him at the time of separation shall be restored.

We must not confuse annuity rights with interest rights. As we have already seen, when a contributor separates from the school service or withdraws from the retirement system he may elect to receive an annuity or a deferred annuity, or demand and receive his accumulated deductions. Once he demands and receives his accumulated deductions, or demands and receives his annuity or deferred annuity, his membership in the retirement association ceases, and he thereupon loses all rights therein. On the other hand, if he allows his accumulated deductions to remain in the fund, he is entitled to regular interest thereon. Later on if he elects to withdraw his accumulated deductions plus the interest credited thereto, all his rights in the fund terminate. However, under paragraph 2 of section 12, *supra*, he may, if he returns to the school service, pay back to the fund his accumulated deductions to the amount to his credit at the time of his separation and thereby accomplish the restoration of his annuity rights.

The fact that he may restore his annuity rights upon his return to the school service if such return is made within five years from his separation has no bearing upon the question of whether he is to be allowed interest for a period beyond five years from his separation. The five-year period of limitation applies to his right to reestablish his annuity rights by return to the school service, not to his right to receive interest upon any accumulated deductions which he has allowed to remain to his credit in the annuity savings account. It follows, therefore, that when a contributor separates from the school service, he may allow his accumulated deductions to remain to his credit in the annuity saving account until such time as he chooses to make demand therefor, unless at the time of his separation he elects to receive an annuity or a deferred annuity, for he cannot have both an annuity and a savings account at interest. If he elects at the time of his separation to allow his accumulated deductions to remain at interest he forfeits his right to an annuity or a deferred annuity unless he returns to the school service within five years from the date of his separation. The fact that our conclusion makes it possible for an employe who has separated from the school service to maintain a savings account at four percent interest until he elects to withdraw it is a matter which only the legislature can alter.

It is our opinion that when a contributor to the School Employees' Retirement Fund separates from the school service and allows his accumulated deductions to remain to his credit in the annuity savings account he is entitled to regular interest thereon until he demands and

is paid from said fund the amount left therein, regardless of whether the date of demand and payment is more than five years from the date of his separation.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 386

*State Board of Censors—Censorship of 16 millimeter films prepared for commercial slot machines—Fee—Act of May 15, 1915, P. L. 534.*

1. Sixteen millimeter or any other width films used in commercial slot moving picture machines must be viewed or examined and approved by the Pennsylvania State Board of Censors before they may be exhibited to the public. A \$2 fee should be charged for examining a reel of film which is less than 1,200 lineal feet in length even though it contains eight separate subjects. A similar charge should be made for each duplicate film or reel or print thereof.

Harrisburg, Pa., February 19, 1941.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: The Pennsylvania State Board of Censors has requested our advice on the following questions:

1. Are 16-millimeter films prepared for commercial slot machines subject to censorship by the board?

2. What fee is to be charged by the board for reviewing and examining a reel of film 16 millimeters wide and 840 feet long, but which contains eight individual subjects that run about 2½ minutes apiece?

We understand, from the information furnished us, that films prepared for use in commercial slot machines are generally 16 millimeters in width, whereas films customarily used in motion picture theatres are 35 millimeters wide. We are also informed that upon inserting the designated coin an individual can view one of the subjects which requires about 2½ minutes of running time; that while each reel will contain eight subjects, it will be impossible for patrons to select any particular subject. We are told that inasmuch as these slot motion picture machines will be widely distributed in restaurants, hotels, etc., a great many copies of a particular reel will be used at the same time

throughout the Commonwealth, for which a similar fee charge is required to be made as for the original reel. We have also been informed that if each of the eight individual subjects in a reel is considered a separate reel in itself, the filing of eight separate applications per reel of eight subjects would be required, which would necessitate more paper work than the money received for them would warrant.

Section 1 of the Act of May 15, 1915, P. L. 534, as amended, 4 P. S. § 43, reads as follows:

The board shall examine or supervise the examinations of all films, reels, or views to be exhibited or used in Pennsylvania; and shall approve such films, reels, or views which are moral and proper; and shall disapprove such as are sacrilegious, obscene, indecent, or immoral, or such as tend, in the judgment of the board, to debase or corrupt morals. This section shall not apply to announcement or advertising slides or to films or reels containing current news events or happenings, commonly known as news reels, which are not in violation of the provisions of this section.

In section 2 of the same act, 4 P. S. § 42, it is provided that:

It shall be unlawful to sell, lease, lend, exhibit, or use any motion-picture film, reel, or view, in Pennsylvania, unless the said film, reel, or view has been submitted by the exchange, owner, or lessee of the film, reel, or view, and duly approved by the Pennsylvania State Board of Censors, hereinafter in this act called the board.

Under section 24 of the same act, 4 P. S. § 52:

Every person intending to sell, lease, exhibit, or use any film, reel, or view in Pennsylvania, shall furnish the board, when the application for approval is made, a description of the film, reel, or view to be exhibited, sold, or leased, and the purposes thereof; and shall submit the film, reel, or view to the board for examination; and shall also furnish a statement or affidavit that the duplicate film, reel, or view is an exact copy of the original film, reel, or view, as submitted for examination to the board; and that all eliminations, changes, or rejections, made or required by the board in the original film, reel, or view has been or will be made in the duplicate.

In interpreting this last cited section, the Supreme Court of this Commonwealth, in the case of *In re Fox Film Corporation's Application*, 295 Pa. 461 (1929), held that the section should be given a wide application and interpreted according to the spirit as well as the letter of the law.

Under sections 27 and 28, 4 P. S. §§ 55 and 56, violations of any of the provisions of the act are punishable summarily by the imposition of a fine and costs, or imprisonment in default of the payment thereof.

In *In re Fox Film Corporation's Application*, supra, it was further pointed out by the Supreme Court that the act is expressed in general language; that it is prospective in its application and purpose; that it contains no express restrictions, and that it applies to all cases that come within its terms and its general aim. As a result, the court reached the conclusion that the definition of "film" includes a "talking film," despite the fact that it was not mentioned by the legislature in the act. Obviously the films which are to be used in the slot machines do not fall within the classification of an "\* \* \* announcement or \* \* \* films or reels containing current news events or happenings, commonly known as news reels \* \* \*," which are exempt from review by the board by the provisions of section 6 of the act. We believe, therefore, that the provisions of section 2 of the act, when considered in the light of the language and ruling contained in the foregoing opinion of the Supreme Court, apply just as much to 16 millimeter films as to 35 millimeter films, and apply also to any films which will be used in commercial slot movie machines. All such films must, therefore, be reviewed, approved and licensed by the board since no distinction is made as to the width of film by the legislature.

We will now consider the second inquiry.

In this question we are concerned with the meaning of the language used by the legislature in section 17, 4 P. S. § 46, when it stated:

For the examination of each film, reel, \* \* \* of one thousand two hundred lineal feet, or less, the board shall receive in advance, a fee of two dollars, \* \* \*.

If an individual film were to be used for the presentation of each subject, it is clear that a fee of \$2.00 would have to be paid for the review and examination of each such film or reel used to display the particular subject, irrespective of its length, so long as it was under 1,200 lineal feet. Does the printing of eight subjects in one reel or on one film make any difference?

A careful study of the entire act which we are considering indicates to us that it is not a revenue tax measure but one which was enacted by the legislature under the police power of the Commonwealth.

In the case of *Buffalo Branch Mutual Fire Corp'n v. Breittinger*, 250 Pa. 225 (1915), in which the constitutionality of the act was upheld, the lower court whose opinion was approved by the Supreme Court, said, per Martin, *P. J.*, at 230:

By reference to the act in question, it clearly appears that it is an exercise of the police power of the State, enacted to conserve the morals and manners of the public, \* \* \*

Charges made under a law enacted pursuant to the police power must be only such as are reasonably necessary for the execution of the law.

The provisions of section 17, *supra*, merely provide that every film or reel is to be examined, and that a charge of \$2.00 is to be made for such examination of every film or reel of 1,200 lineal feet or less. The act makes no provision for examination of each subject, but of "each film, reel, \* \* \* of one thousand two hundred lineal feet, or less." It is apparent, therefore, that inasmuch as the submitted reels of the commercial slot movies are but 840 lineal feet, the charge should be \$2.00 for the examination of each such reel or film, and a similar charge for each duplicate or print thereof.

We are, therefore, of the opinion:

1. That 16 millimeter, or any other width films used in commercial slot movie machines must be viewed or examined and approved by the Pennsylvania State Board of Censors before they may be exhibited to the public; and
2. That a \$2.00 fee should be charged for examining a reel or film which is less than 1,200 lineal feet in length even though it contains eight separate subjects; and a similar charge should be made for each duplicate film or reel or print thereof.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

GEORGE J. BARCO,  
*Deputy Attorney General.*

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OPINION No. 387

*Employment Board—Employees—Eligible list—Certification of names—Removal because of misstatements in applications.*

If the board discovers intentional falsification amounting to fraud in any application, it should forthwith certify such person to the secretary for summary dismissal, and all persons who so falsify should be stricken from the eligible list. The removal of any person who has passed his probationary period must be considered a dismissal which entitles the employe to an appeal. If, on appeal, the reviewing board finds and decides that the employe was not guilty of fraud or misrepresentation, and that there was no falsification of said employe's application, then since the decision of the appellate body transcends that of the employment board, the employe's name should be restored to the eligible and

certified lists. Removal from eligible lists and consequent cancellation of certification on the ground of falsification of application should be such fraud as would have affected the candidate's position on the certified list.

Harrisburg, Pa., February 21, 1941.

Honorable Howard L. Russell, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of December 10, 1940, requesting an opinion relative to procedure to be followed with regard to the cancelling of certification of names to an eligible list and consequent removal of employes because of discoveries of misstatements in applications.

Specifically you submit the following questions:

1. When a certification is cancelled subsequent to appointment, is it mandatory upon the employer (the department or a county board) to remove the person's name from the pay roll?

2. Is such a removal of a person who has passed his probationary period to be considered a dismissal which entitles the employes to an appeal?

3. If an employe whose name is thus removed from the pay roll has the right of appeal, does the decision of the Reviewing Board make it mandatory upon the Employment Board to rescind its action in cancelling certification, if the Reviewing Board decides that the employe should not be dismissed?

4. What are the general principles the Employment Board should follow in arriving at a decision to cancel the certification of a person already appointed because of the discovery of some misstatement in his application?

The answers to your several inquiries are found in the provisions of the Public Assistance Law, approved June 24, 1937, P. L. 2051, as amended, 62 P. S. § 2501, et seq., and also The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended June 24, 1937, P. L. 2003, 71 P. S. § 664, et seq., which acts provide for employment and removal of all persons employed by the Department of Public Assistance. The latter enactment requires that the personnel for the administration of the service shall be chosen on a civil service basis. Section 2504-A of The Administrative Code of 1929, as amended, sets forth in detail the civil service provisions and requirements. Certain phases of the administration of the civil service sections of the act are vested in an employment board of three members appointed by the Governor by and with the consent of the Senate. This employment board is a departmental administrative board within the Department of Public Assistance.

Under section 2504-A (b) 1 and 2 the board is charged with certain definite duties as follows:

1. Prepare and conduct examinations for employment, which shall be practical in their character, and, so far as may be possible, shall relate to those matters directly bearing on and which will fairly test the relative capacity and fitness of persons examined to discharge the duties of the service into which they seek to be appointed, but no applicant shall be required to have had any scholastic education in social service work, nor to have had any other special scholastic education or special training or experience. In written examinations, the identity of each applicant shall be unknown to the examiners.

2. Grade each person taking an examination by a method of rating published as part of the announcement of the test, except that, in the final rating of all applicants, persons who were engaged in the military or naval service of the United States during any war in which the United States was engaged, and who have an honorable discharge from such service, shall receive in addition to all other ratings an additional five per centum, and any such person who shall have been disabled by wounds or in any other manner while engaged in such service (so long as he is able to perform the work of the employment for which he is examined), shall be rated an additional five per centum over and above the five per centum hereinbefore set forth, and in either case, the total per centum mark or grade thus obtained shall determine the standing of any such persons on any list of eligibles.

Under section 2504-A (d) additional duties are imposed on the employment board, such as compilation of an eligible list from which certification shall be made. Then follow provisions regarding probation, transfers, suspensions, demotion and removal.

Section 2504-A (h) has reference to demotion and removal and prescribes as follows:

(h) **DEMOTION AND REMOVAL.** An employer may demote or remove an employe for just cause only after giving him written reasons for such action, and an opportunity to file a written answer. Both of such writings shall be promptly reported to the Employment Board, and shall be part of its public records. Such employes may appeal to the reviewing board under the rules and regulations established jointly by the State Board of Public Assistance and the Employment Board.

By section 1203 of the joint regulations of the Department of Public Assistance and the employment board, such appeals are limited to permanent employes. The finding of the reviewing board is binding and final, except that by section 1218 of such regulations the employment board has the power to set aside the decision of the reviewing

board if the employment board is of the opinion that the reviewing board did not conduct a fair hearing or there is no substantial credible evidence to support the conclusions of the reviewing board. Another exception is found in section 4 (k) of the Public Assistance Law, as amended, *supra*, which provides as follows:

The Department of Public Assistance shall have the power, and its duty shall be:

x       \*       \*       \*       \*

(k) To recommend to the Governor that any person employed by the department be suspended or removed from service. Upon receipt of such recommendation the Governor shall have power to suspend or remove such employe if he deems the same to be the best interests of the public service.

Under this provision, we find that if the reviewing board should order an employe reinstated, the secretary has the right to recommend to the Governor the suspension or removal of such person, and the Governor has the right to remove or suspend such person if he deems this to be to the best interest of the public service.

You have informed us that in a number of cases applications of persons who have achieved civil service status have been falsified, and that in such cases, the employment board has cancelled certifications to eligible lists and removed such named from eligible lists. Due notification of this fact has been sent to the employer, namely, the county assistance board, the state board or the department, with instructions that such employes should be removed.

You further inform us that, for the purpose of the proper administration of the civil service provisions of the Public Assistance Law, it is necessary for your department to have the above provisions of the law interpreted, with particular reference to the right of such employes, removed for falsification of application, to appeal to a reviewing board, and the respective authority of the employer, the State board, the department, the county board and the employment board, over removal and review.

It is important first to note the general purposes of civil service provisions which are well stated generally in 10 American Jurisprudence (Civil Service), page 921, as follows:

\* \* \* They require that appointments to office be made from among those who, by examination, have shown themselves to be best qualified. Examinations are also usually required for promotions from lower to higher grades within the public service, and a discharge or removal may be made only for a just cause and, under many statutes, must be upon notice and hearing. As might be supposed, the result is gen-

erally an improvement in the public service from the experience and proficiency acquired through this merit system, and in a tenure of office which is independent of political favor.

Obviously, the purpose of the Public Assistance Law, above cited, was to establish a system whereby employes would be selected on the basis of their qualifications, to provide for certification of eligible lists on the basis of merit and fitness, determined by means of examination, written or oral, and appointment therefrom, with permanence of service after probationary period. The legislators propose, through civil service, to attain some degree of permanence and stability in the personnel of this important governmental agency. However, since the objectives of civil service requirements are defeated by any break-down in the method of selection, the permanence and stability attained through an efficient civil service must be upset if fraud has been used to obtain a place on the eligible list or an appointment. Eligible lists and appointments are valid only in the absence of fraud: See 30 Op. Atty. Gen. (U. S.) 169; 5 USCA, section 638, note 5.

An examination of the Public Assistance Law discloses that both the department and the employment board are charged with the proper enforcement of the personnel provisions of the Public Assistance Law which imposes upon both the duty of seeing that appointments to the Department of Public Assistance are made in conformity with the law. If appointments are not so made, the wrongful expenditure of public funds is involved. Additionally, if the intention of the Commonwealth is to expend money on the basis of highly qualified personnel, but in fact, expenditures are made to appointees not only not meriting, and not fitted for the positions they are filling, but illegally appointed, then in the interests of sound economy and efficient administration, the department and the employment board have the duty and the right to take appropriate action.

If fraud or misrepresentation exist and can be proven as to certain names, then these names should be expunged from the eligible lists, and certifications should be cancelled with subsequent removal. Authority for this statement may be found in the case of *Thurston v. Unemployment Compensation Board of Review*, 140 Pa. Super. Ct. 254 (1940), where Judge Keller, in a learned and comprehensive opinion, approving dismissal of an employe for falsification of application, said:

Furthermore, it is desirable as a matter of public policy that civil service employes under the statute shall be *composed of honest and truthful persons; and fraud and misrepresentation in securing the appointment are grounds for dismissal*. See *Kassarich v. Unemployment Compensation*

Board of Review, 139 Pa. Superior Ct. 599, 12 A. 2d 823; *Gangwer v. Unemployment Compensation Board of Review*, 137 Pa. Superior Ct. 453, 9 A. 2d 490; Sec. 208 (s) of the Act of December 5, 1936, *supra*. (Italics ours.)

Likewise, in the case of *Kassarich v. Unemployment Compensation Board of Review*, 139 Pa. Super. Ct. 599 (1940), the court held that errors in the selection of the list of eligibles were cured by appointment, except those arising from fraud, misrepresentation or misconduct.

A consideration of what constitutes fraud, misrepresentation, error or mistake takes us into an involved field of the law. It is important for your department and the board to note that misrepresentation must be material in order that the law may take notice of it as fraud. Fraud is defined in Restatement, Contracts, section 471, to mean:

\* \* \* "(a) misrepresentation known to be such, or (b) concealment, or (c) non-disclosure where it is not privileged, by any person intending or expecting thereby to cause a mistake by another to exist or to continue, in order to induce the latter to enter into or refrain from entering into a transaction; except as this definition is qualified by the rules stated in section 474."

It should be noted that fraud should not only be material but there should be sufficient objective proof to substantiate the charge of fraud in a court of law.

In 5 Williston, Contracts, section 1515, it is further stated:

No legal wrong is caused by false and fraudulent representations unless they induce action in reliance thereon.  
\* \* \* But it is not necessary that such representations should have formed the only inducement for entering into a transaction; it is enough if they were a material inducement. \* \* \*

Judge Keller succinctly stated the principle in *Thurston v. Unemployment Compensation Board of Review*, *supra*, when he said that fraud should be such as would have affected the candidate's position on the certified list. For example, if a person alleged in his application that he had a high school and college training, when in fact he did not have such training, and high school and college training were essential for placement on the eligible and certified list, this misstatement would amount to such fraud as would justify removal. In answer to the question, "Were you ever convicted of a crime?" if applicant had been arrested and pleaded guilty or was found guilty by verdict of a jury and sentenced, and failed to state such circumstances, he also would be guilty of such fraud as would justify removal.

Though the term "conviction" is not here used in the technical sense, it might be well to inquire into its meaning.

Ballentine's Law Dictionary defines conviction as:

The confession of a person who is being prosecuted for crime, in open court, or a verdict returned against him by a jury, which ascertains and publishes the fact of his guilt.

In *United States v. Watkins*, 6 Fed. 152 (C. C. Ore. 1881, the court stated:

\* \* \* The term conviction, as its composition (*convinco*, *convictio*) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt according to some known legal mode. These modes are, (1) by the plea of guilty, and (2) by the verdict of a jury.

There is no fraud if an applicant fails to furnish information not requested in the questions put to him and thus the applicant would only have to answer as to the instances in which he had been arrested and pleaded guilty, or was found guilty by a verdict of a jury, as above.

Both the department and the employment board are charged with the duty of seeing that the Public Assistance Law is well administered by trained, competent and honest personnel. In view of the broad humanitarian principles behind the Public Assistance Law and the important function the law is here designed to perform, it is of the greatest importance that it be properly administered on a non-partisan basis. This fact was recognized by the legislature which accordingly incorporated civil service provisions into the law to effectuate this type of administration.

Since both the department and the employment board are thus charged with and interested in the efficient administration of the Public Assistance Law, circumstances dictate a real need for cooperation and mutual confidence between the department and the employment board. Moreover section 501 of The Administrative Code of 1929, *supra*, requires such cooperation. In this way fraud or abuses in the selection of personnel may be corrected, or fraud eliminated, and the Public Assistance Law efficiently administered.

In view of the foregoing, we are of the opinion that:

1. If the employment board discovers intentional falsification amounting to fraud in any application, it should forthwith certify such person to the secretary for summary dismissal, and all persons who so falsify should be stricken from the eligible lists. There is a falsification of application if the applicant claims to have had greater experience than the applicant actually has, since such a claim gives the person higher grades and, therefore, higher ranking on the lists of

eligibles, thus obviously making the subsequent appointment one which has been received through fraud.

2. The removal of any person who has passed probationary period must be considered a dismissal which entitles the employe to an appeal in accordance with section 2504-A (h) of the Act of June 24, 1937, P. L. 2003. This conclusion is in line with *Thurston v. Unemployment Compensation Board of Review*, 140 Pa. Super. Ct. 254, and *Kassarich v. Unemployment Compensation Board of Review*, 139 Pa. Super. Ct. 599, 12 A. 2d 823, and the line of unemployment cases involving dismissals for falsification of applications amounting to fraud wherein appointees were given the right of appeal under the Unemployment Compensation Act to the Unemployment Compensation Board of Review and the Superior Court.

3. If, on appeal, the reviewing board finds and decides that the employe was not guilty of fraud or misrepresentation, and that there was no falsification of said employe's application, then since the decision of the appellate body transcends that of the employment board, the employe's name should be restored to the eligible and certified lists. When the reviewing board finds that cancellation of certification on the ground of fraud has no basis in fact the cancellation is void and such employe's name should be replaced on the pay roll. However, in accordance with section 4 (k) of the Public Assistance Law of June 24, 1937, P. L. 2051, as amended June 26, 1939, P. L. 1091, 62 P. S. § 2501, et seq., if the reviewing board should order an employe reinstated, the secretary has the authority to recommend to the Governor the suspension or removal of said employe, and the Governor has the authority to suspend or remove such employe if he deems such action to be the best interest of the public service.

4. The general principles which the employment board should follow in arriving at a decision to cancel certification of a person already appointed is fully discussed above by excerpts from Williston, Contracts, and the Superior Court cases ruling on dismissals from the Bureau of Employment and Unemployment Compensation of the Department of Labor and Industry. Briefly, removal from eligible lists and consequent cancellation of certification on the ground of falsification of application should be such fraud as would have affected the candidate's position on the certified list.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

## OPINION No. 388

*Women's Labor Law—Hour provisions—Women employed by railroads engaged in interstate commerce—Exemption—Act of July 25, 1913, P. L. 1024, as amended; Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577.*

When the interstate carriers and their employes enter into collective bargaining agreements under and by virtue of the Railway Labor Act, the Pennsylvania act regulating hours of labor by females, is superseded by said Federal enactment, and agreements made thereunder; thereafter women employes of railroads engaged in interstate commerce are no longer subject to the provisions of the said Pennsylvania act.

Harrisburg, Pa., March 4, 1941.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of June 26, 1940, requesting our opinion on whether or not women within the State, employed by railroads engaged in doing interstate commerce business, are exempt from the hour provisions of the Pennsylvania Act of July 25, 1913, P. L. 1024, as amended, 43 P. S. § 101, et seq., commonly referred to as the Women's Labor Law.

The purpose of the said Women's Labor Law is to regulate the hours of labor of females, and section 3 thereof provides as follows:

Section 3. (a) Except as hereinafter provided, no female shall be employed or permitted to work in, *or in connection with, any establishment* for more than five and one-half days in any one week, *or more than forty-four hours in any one week*, or more than eight hours in any one day: Provided, That one day of rest may be subdivided into two days of twelve hours each, for women employes in hotels, boarding houses, and in charitable, educational and religious institutions, at the discretion of the Department of Labor and Industry, with the approval of the Industrial Board. (Italics ours.)

Section 1 of the Women's Labor Law defines "establishment" thus:

Section 1. Be it enacted, &c., That the term "establishment," when used in this act, shall mean any place within this Commonwealth where work is done for compensation of any sort, to whomever payable.

This would apply to employment in railroads engaged in interstate commerce. In the absence of Federal enactments, this provision of the law could, under the police power; apply to service rendered to any railroad company when the employment takes place anywhere within this Commonwealth.

That the regulation of hours of labor of women is within the police power of the State is enunciated in the case of *Muller v. Oregon*, 208 U. S. 412 (1908) wherein it was held:

\* \* \* Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. \* \* \*

It is clear that the legislature, in exercising its police power, has authority to regulate the hours of labor of females. The authority of the State, in the absence of Federal legislation, to enact laws in the exercise of its police power for the purpose of establishing such reasonable regulations as are appropriate for the protection of the health and safety of its citizens, is no longer open to question even though such legislation may affect interstate commerce: See *New York, New Haven & Hartford Railroad Company v. New York*, 165 U. S. 628 (1897), where the court said:

According to numerous decisions of this court (some of which are cited in the margin) sustaining the validity of state regulations enacted under the police powers of the state and which incidentally affected commerce among the states and with foreign nations, it was clearly competent for the state of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution (*Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 211 [6:23, 73], the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people. \* \* \*

\* \* \* Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains. The statute in question is not directed against interstate commerce. Nor is it within the meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the state to regulate the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and

among the several states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned.

However, if and when Congress enacts legislation upon the subject of hours of labor of female employes of railroads engaged in interstate commerce, the power of the State to regulate such hours is subordinated to the Federal, and if there is a conflict between the State and Federal legislation, the former must yield to the latter: See *Erie Railroad v. New York*, 233, U. S. 671, 58 L. Ed. 1149, 34 S. Ct. 756 (1914), where the court stated:

\* \* \* The relative supremacy of the state and national power over interstate commerce need not be commented upon. Where there is conflict, the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist. \* \* \*

We realize the strength of those observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.

It is necessary, therefore, to consider whether Congress has enacted such legislation as to manifest a definite purpose to exercise its constitutional authority and regulate hours of employment of females employed by interstate carriers.

The Act of March 4, 1907, c. 2939, 24 Stat. 1415, 45 U. S. C. A., section 62, referred to as the Hours of Service Act, limited hours of service to sixteen consecutive hours, as follows:

It shall be unlawful for any common carrier, its officers or agents, subject to this chapter to require or permit any employe subject to this chapter to be or remain on duty for a longer period than sixteen consecutive hours, \* \* \*

The only employes included within this statute are those "actually engaged in, or connected with the movement of any train": See *San Pedro, etc., R. Co. v. United States*, 213 Fed. 326. It is evident, therefore, that this Act of March 4, 1907, *supra*, is limited in its scope and does not regulate hours of labor of female employes, unless they are employed in connection with the movement of any train: See Opinion of Francis Shunk Brown, Official Opinions of the Attorney General, 1917-1918, pages 482-486.

In an effort to establish a complete and satisfactory system for the fixing of wages, hours and working conditions of railroad employes and for the settlement of labor disputes that arise on interstate car-

riers, Congress passed the Railway Labor Act, the Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 926, 1185, and the Act of June 25, 1936, c. 804, 49 Stat. 1921, 45 U. S. C. A., sections 151-163, et seq. In this act, the term "employee" is defined as follows:

\* \* \* *every person* in the service of a carrier \* \* \* who performs any work defined as that of an employe or subordinate official in the orders of the *Interstate Commerce Commission*. (See 45 U. S. C. A., section 151.)

One of the general purposes of the Railway Labor Act, as provided in section 151 (a), is to provide for the orderly settlement of all disputes concerning rates of pay or working conditions. Section 152 provides that it shall be the duty of all carriers, their officers, agents and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions. The general purpose of the Railway Labor Act is to secure the right of collective bargaining to employes whose interests are involved through representatives chosen by a majority of the employes and to promote peaceful consideration of labor disputes. It is true that the Railway Labor Act does not specifically mention hours of service and it might be argued, therefore, that the State law and the Federal law can stand together in that the form of the Railway Labor Act seems to have invited and to have left the subject regarding the hours of service relating to females and minors open for supplemental State legislation, if necessary, and that the Pennsylvania Women's Labor Law simply supplements the action of Congress.

A contention similar to the foregoing was presented to the Supreme Court of the United States in the case of *Erie Railroad v. New York*, supra, concerning a law enacted by the State of New York as it related to the Hours of Service Act of 1907 enacted by Congress. The court, at page 683, disposed of the argument in the following language:

We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, *the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.* (Italics ours.)

The principal of law laid down by the court in the foregoing decision is that after Congress acts on a matter within its exclusive jurisdiction, there is no division of the field of regulation.

In the case of *Long Island Railroad Co. v. Department of Labor*, 256 N. Y. 498 (177 N. E. 17), (1931), the question considered by the Court of Appeals of New York was whether or not the Labor Law of

New York, regulating hours of work of laborers, workmen and mechanics upon the elimination of railroad grade crossings, applied to employes of carriers when the carriers were directed to perform the work by its own employes. The court, referring to the Railway Labor Act, said at page 516:

\* \* \* It provides a method for fixing wages of employes by free contract or adjustment of labor disputes. It includes as an employe subject to its provisions "every person in the service of a carrier \* \* \* who performs any work defined as that of an employe or subordinate official in the orders of the Interstate Commerce Commission." \* \* \* *Its purpose of ending labor disputes may be thwarted by any regulation of the state compelling payment of wages to "employees" at a different rate.* It seems to us clear that Congress intended to exclude any interference by any state in the field of wages of employes of interstate carriers. The Labor Law of this state may for these reasons not be applied to any "employee," as defined in the federal act, where the carrier is directed to perform work by its own employes. \* \* \* (Italics ours.)

The constitutionality of the Railway Labor Act was upheld in the case of Texas & New Orleans Railroad Company, et al. v. Brotherhood of Railway & Steamship Clerks et al., 281 U. S. 548 (1930). See also Virginian Railway Company v. System Federation No. 40, 300 U. S. 515 (1937).

The Railway Labor Act was the forerunner of the National Labor Relations Act, the Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A., Section 151, which adopted substantially the same principles for industry as were embodied in the Federal Railway Labor Act of 1926, supra, for railroads.

The constitutionality of the National Labor Relations Act was sustained in the case of National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1 (1937). Agreements under the National Labor Relations Act are limited as to hour provisions by the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, 29 U. S. C. A., § 201, et seq. However, railroads are exempt from the provisions of both the National Labor Relations Act and the Fair Labor Standards Act. See section 13 (b) (2) of said Fair Labor Standards Act which exempts railroad carriers as follows:

(b) The provisions of section 208 shall not apply with respect to (1) any employe with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) *any employe of an employer subject to the provisions of Part 1 of the Interstate Commerce Act.* (Italics ours.)

From the foregoing review of Federal legislation, it is observed that there is a clear legislative intention to exempt railroads from general enactments and to legislate particularly on the subject of interstate carriers in an effort to promote uniformity of regulation regarding such carriers.

Although the legislature may not, as a general rule, delegate any of its functions nor usurp any of the powers or functions of either of the other two coordinate branches of the government, it may delegate certain of its powers to administrative boards and commissions provided such authority is circumscribed with certain standards, policies and limitations. It is absolutely essential that limits be set on the power conferred and that the scope authorized clearly appear.

In *Wichita R. & L. Co. v. Public Utilities Commission*, 260 U. S. 48 (1922), the court said:

In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action.

If the legislature fails, however, to prescribe with reasonable clarity the limits of the power delegated or if those limits are too broad, its attempt to delegate is a nullity: *Schechter Poultry Corporation v. United States*, 295 U. S. 495 (1935); *Panama Refining Company v. Ryan*, 293 U. S. 388 (1935).

In *Schechter Poultry Corporation v. United States*, *supra*, the Chief Justice, in passing upon the constitutionality of the NIRA, said:

\* \* \* Section 3 is without precedent. It supplies no standard for any trade industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. \* \* \* In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and those enacting laws for the government of trade and industry throughout the country, is virtually unfettered. \* \* \*

In the *Railway Labor Act of 1926*, *supra*, Congress has manifested its purpose to exercise its constitutional authority to regulate the hours of labor of railroad employes by delegating such authority to two administrative bodies, namely, the National Mediation Board

and the National Railroad Adjustment Board. In the Railway Labor Act of 1926, Congress has carried out its purpose of promoting self-organization, collective bargaining, settlement of disputes growing out of grievances and the application of agreements covering rates of pay, hours and working conditions generally by setting up the above two administrative agencies; the former to certify collective bargaining agents and interpreting agreements and the latter to settle industrial disputes with appeal to the district court. The fairness of collective bargaining agreements between interstate carriers and employe unions is thus checked through these two administrative agencies which are charged with the duty of protecting and enforcing the rights and responsibilities of the various parties to the agreements.

Under and by virtue of the Railway Labor Act of 1926, as amended, *supra*, interstate carriers in Pennsylvania have entered into a collective bargaining agreement whereby employers and employes agree on a forty-eight hour week for all employes of such interstate carriers. Since these agreements are made under the Federal Railway Labor Act of 1926, as amended, *supra*, their provisions supersede the requirements of the State law relative to hours. Congress having constitutional authority so to do, has provided for a single, integrated and all-embracing system for interstate carriers. When Congress passed the Railway Labor Act of 1926, as amended, *supra*, its purpose to occupy the field of regulation of hours, wages and conditions of labor of railroads was clearly manifested in order to promote one uniform national railway system of regulation.

It is true that the State may regulate hours of employment of an interstate carrier, even if such regulation affects interstate commerce, if such regulation affects interstate commerce only incidentally and indirectly. However, if and when Congress, recognizing interstate carriers as their special wards and endeavoring to gain uniformity in the regulation of an industry that is national in scope, provides for agreements between employers and employes relative to hours, wages and conditions of labor, since Congress has thus invaded the field of regulation of interstate carriers and assumed exclusive control over working conditions in said interstate railroads, the State enactment is superseded and the Federal enactment governs: See *Oregon-Washington Railroad & Navigation Company v. State of Washington*, 270 U. S. 87, 70 L. Ed. 482, 46 S. Ct. 279 (1925), where a Federal Act governing the field of plant disease as far as the spread of such disease by interstate transportation was concerned, was held even in the absence of action by the administrative agency, to supersede State action establishing quarantine against such disease, the court holding:

It follows that pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject cannot be given application. It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act there is on invalidity in the state action. Such construction as that cannot be given to the Federal statute. The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, state action is illegal and unwarranted.

In the regulation of highways, since roads belong to the State, the court is inclined to take the viewpoint that State regulation is not superseded by Federal regulation, unless the purpose of Congress to so supersede State action is clearly manifested, and in the case of *H. P. Welch v. New Hampshire*, 306 U. S. 79, 83 L. Ed. 500 (1938); it was held that a state statute regulating the hours of bus drivers was not superseded during the period intervening between the Federal enactment and the effective date of the regulations prescribed by the Interstate Commerce Commission under authority conferred by the Federal enactment. See also *Hines v. Davidowitz*, U. S. , 85 L. Ed. 366, 61 Sup. Ct. 399 (1941) where a state act providing for registration of aliens resident within the state was declared to be superseded by the mere enactment of a Federal statute providing for the national registration of aliens, the court holding:

\* \* \* And whether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable. The legislative history of the Act indicates that Congress was trying to steer a middle path, realizing that any registration requirement was a departure from our traditional policy of not treating aliens as a thing apart, but also feeling that the Nation was in need of the type of information to be secured. Having the constitutional authority so to do, it has provided a standard for alien registration, in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens. When it made this addition to its uniform naturalization and immigration laws, it plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, \* \* \* Under these circumstances, the Pennsylvania Act cannot be enforced. \* \* \*

By the same token, interstate railroads being a matter of national concern, Congress had the constitutional power to provide a single,

integrated and all-embracing system for the regulation of all conditions of labor, including hours, wages, etc. Action taken under such Federal enactment, the Federal Railway Labor Act of 1926, supersedes the State enactments in the field.

In view of the foregoing, since Congress has, by the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, as amended 45 U. S. C. A., § 151-163, acted in the field of regulation of hours, wages and conditions of labor of employes of interstate carriers, by granting the right to interstate carriers and employe unions to enter into agreements regarding hours, wages and conditions of labor, subject to control by the National Mediation Board and the National Railroad Adjustment Board, it manifested its intention to exercise its constitutional authority to regulate hours, wages and conditions of labor of such interstate carriers. When the interstate carriers and their employes enter into collective bargaining agreements under and by virtue of such Federal Railway Labor Act, the Pennsylvania Act of July 25, 1913, P. L. 1024, as amended, 43 P. S. § 101, et seq., regulating hours of labor of females, is superseded by said Federal enactment, and agreements made thereunder; thereafter women employes of railroads engaged in interstate commerce are no longer subject to the provisions of the said Pennsylvania act.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 389

*Motor Police Retirement System—Retirement of employes non-enlisted and not having police power—Act of June 29, 1937, P. L. 2423.*

1. An employe non-enlisted and not having police power, is entitled to retirement under the provisions of Act No. 453, 1937, the act establishing a Motor Police Retirement System. A person employed as a clerk, or in an administrative capacity by the Pennsylvania Motor Police, and not having police power, is also eligible for retirement under the act.

Harrisburg, Pa., March 5, 1941.

Honorable S. M. R. O'Hara, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Madam: We have your request for an opinion upon the following questions:

1. Is an employe of the Pennsylvania Motor Police non-enlisted and not having police power entitled to retire under the provisions of Act 453, approved June 29, 1937, P. L. 2423, 71 P. S. § 1761.1 et seq.?

2. Is a person employed as clerk, or in an administrative capacity by the Pennsylvania Motor Police, and not having police power, eligible for membership in the State Employes' Retirement System, and eligible for retirement under the Act of June 27, 1923, P. L. 858, as amended, 71 P. S. § 1731, or under the Act of June 29, 1937, P. L. 2423, supra?

You state that superannuation retirement age under the aforesaid Act 453, approved June 29, 1937, P. L. 2423, commonly referred to as the "Pennsylvania Motor Police Retirement Act," is classified as to year until the year 1948, and during that year and subsequent thereto fixes the superannuation age at 50; and that superannuation retirement age under the Act of June 27, 1923, P. L. 858, as amended, creating the State Employes' Retirement System, fixes superannuation age at 60. Our attention is specifically directed to section 6 of Act 453, supra.

As we understand the situation your inquiry resolves itself into the question whether the benefits of the Pennsylvania Motor Police Retirement System are restricted to members having police power. We are unable to find that such was the manifest intent of the legislature as expressed by the language of the act.

The establishment of a retirement system for members of the Pennsylvania Motor Police is provided by the Act of June 29, 1937, P. L. 2423, 71 P. S. § 1761.1 et seq. The title of said act is as follows:

An Act establishing a Pennsylvania Motor Police Retirement System; providing for payments upon retirement, death, disability, involuntary retirement, and of certain medical expenses from the State Employes' Retirement Fund, under the Administration of the State Employes' Retirement Board; providing for contributions by members of the Pennsylvania Motor Police and the Commonwealth; providing for the guarantee by the Commonwealth of certain of said funds; providing for the subrogation of the Commonwealth to the rights of the member or dependents against certain third parties; exempting annuities, allowances, returns, benefits, and rights from taxation and judicial processes; and providing penalties.

Section 2 of said act is as follows:

A retirement system is hereby established for the members of the Pennsylvania Motor Police, which system shall be administered by the State Employees' Retirement Board of the Treasury Department.

Just what constitutes membership in the Pennsylvania Motor Police Retirement System is not clearly defined in the act.

However, an original member is defined in section 1 of the act, 71 P. S. § 1761.1, as follows:

"Original Member," a person employed by the Pennsylvania State Police or the State Highway Patrol prior to January first, one thousand nine hundred and twenty-five, and who is an employe of the Pennsylvania Motor Police.

In the same section, a new member is defined as follows:

"New Member," a person who became a member of the Pennsylvania State Police, or the State Highway Patrol, or the Pennsylvania Motor Police, subsequent to December thirty-first, one thousand nine hundred and twenty-four.

Section 6 of the act provides for the compulsory membership of those having police powers, 71 P. S. § 1761.6, as follows:

Every member of the Pennsylvania Motor Police having police power shall be required to become a member of the retirement system established by this act on January first, one thousand nine hundred and thirty-eight, and thereafter when first becoming a member of the Motor Police. \* \* \*

It must be evident from the foregoing section that the act establishing the Pennsylvania Motor Police Retirement System, *supra*, contemplated two classes of members, those having police powers, and those not having such powers. Had the legislature intended that the benefits of the act should not apply to both classes, it might well have said so.

The Act of June 27, 1923, P. L. 858, as amended, 71 P. S. § 1731, referred to in your second inquiry governs the State Employees' Retirement System and provides in section 2, *inter alia*, as follows:

A State employes' retirement association is hereby organized, the membership of which shall consist of all State employes, as defined in paragraph six of section one of this act, who, by written application to the Retirement Board, shall, either as an original member or a new member, elect to be covered by the retirement system. \* \* \*

However, We cannot find that the State Employees' Retirement Act controls your present inquiries, notwithstanding the terms of section 26 of the Motor Police Retirement Act, 71 P. S. § 1761.26, which provides as follows:

Except as otherwise provided in this act, the retirement system established by this act shall be administered in accordance with the laws, rules and regulations applying to the State Employees' Retirement System.

Section 205 of The Administrative Code of 1929, as amended, states in part, as follows:

The Pennsylvania Motor Police shall consist of a Commissioner, a Deputy Commissioner, the State police force, and the State Highway Patrol, as now authorized by law, which are hereby consolidated into one force, to be known as the Motor Police Force, *and such chiefs, statisticians, clerks, experts and other assistants*, as the commissioner, with the approval of the Governor, shall deem necessary for the work of the force. (*Italics supplied.*)

That the legislature contemplated powers and duties of the Pennsylvania Motor Police other than active police duties, appears from section 710 of The Administrative Code of 1929, as amended, June 29, 1937, P. L. 2436, which provides, *inter alia*, as follows:

Section 710. Pennsylvania Motor Police.—The Pennsylvania Motor Police shall have the power, and its duty shall be:

\* \* \* \* \*

(f) To collect and classify, and keep at all times available, complete information useful for the detection of crime, and the identification and apprehension of criminals. Such information shall be available for all police officers within the Commonwealth, under such regulations as the Commissioner of Pennsylvania Motor Police may prescribe.

It has been suggested that it was the intent of the legislature to establish, for motor policemen, a separate retirement system, which would afford them greater benefits than membership in the State Employees' Retirement System, on account of the extra hazards incidental to their employment as motor policemen. It has been argued that there is no reason why a typist, clerk or other administrative employe of the motor police should be retired at an age earlier than that of any other State employe.

However, the law is otherwise; and the remedy, if one is necessary, lies with the legislature.

It is well settled that under the Statutory Construction Act of May 28, 1937, P. L. 1019, section 51, when the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. See *Commonwealth v. Chester County Light and Power Company*, 339 Pa. 97 (1940).

We are of the opinion, therefore, that:

1. An employe of the Pennsylvania Motor Police, non-enlisted and not having police power, is entitled to retirement under the provisions of Act 453, approved June 29, 1937, P. L. 2423, 71 P. S. § 1761.1 et seq., the act establishing a Motor Police Retirement System; and
2. A person employed as a clerk, or in an administrative capacity by the Pennsylvania Motor Police, and not having police power, is also eligible for retirement under the Act of June 29, 1937, P. L. 2423, the Motor Police Retirement Act, *supra*.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

H. J. WOODWARD,  
*Deputy Attorney General.*

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OPINION No. 390

*Bureau of Employment and Unemployment Compensation—List of Eligibles—  
Fraud—Right to declare certain lists null and void—Rule and Resolution No.  
46.*

Under the provisions of the Pennsylvania Unemployment Compensation Law, the Act of December 5, 1936, P. L. 2897, as amended, and The Administrative Code of 1929, the Secretary of Labor and Industry, within his discretion, has the authority to issue Rule and Resolution No. 46, which rescinded and declared null and void as of July 12, 1940, classes and grades of employment listed in said rule and resolution.

Harrisburg, Pa., March 19, 1941.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your recent communication requesting an opinion regarding the validity of Rule and Resolution 46 of the Department of Labor and Industry, which rule rescinded and declared null and void certain lists of eligibles in certain grades and classes of employment in the Bureau of Employment and Unemployment Compensation.

You inform us that not only were lists of eligibles inadequate and out-of-date (examinations having been given in August of 1937), but that as a result of official investigations made by the Unemployment Compensation Board of Review and the Senate Investigating Com-

mittee, there had come to your official attention disclosures of fraud in the compiling of such lists of eligibles. You also state that from the data submitted, much of which was in the form of sworn testimony, you found that the fraud was of such nature and of such a quantity as to make a continuance of the use of the list of eligibles a fraud upon the Commonwealth.

The Unemployment Compensation Law, approved December 5, 1936, P. L. 2897, as amended May 18, 1937, P. L. 658 and June 20, 1939, P. L. 458, P. S. §§ 751 et seq., which provides for payment of unemployment compensation benefits to certain unemployed persons, is administered by the Department of Labor and Industry through its Bureau of Employment and Unemployment Compensation.

The general purpose and duties of the Department of Labor and Industry are defined in section 201 of the Unemployment Compensation Law, supra, as follows:

General Powers and Duties of Department.—It shall be the duty of the department to administer and enforce this act through such employment service and public employment offices as have been or may be constituted in accordance with the provisions of this act and existing laws. It shall have the power and authority to adopt, amend, and rescind such rules and regulations, require such reports from employers, employes, the board and from any other person deemed by the department to be affected by this act, make such investigations, and take such other action as it deems necessary or suitable. Such rules and regulations shall not be inconsistent with the provisions of this act, and shall be effective in the manner the department shall prescribe.

\* \* \*

The powers of the Department of Labor and Industry relative to rules and regulations and employment and unemployment are also set forth in sections 2205 and 2210, respectively, of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §§ 561-574.

The Unemployment Compensation Law specifically requires that the personnel for the administration of the service shall be chosen on a civil service basis, and section 208 thereof outlines in detail the civil service provisions and requirements. Under this section, the Secretary of Labor and Industry has broad powers conferred upon him; for example, the secretary establishes classes of employment (section 208 (d)); he prescribes minimum qualifications for employes (section 208 (e)); he makes appointments from lists of eligibles (section 208 (j)); and may, subject to appeal, dismiss, suspend or furlough employes (section 208 (o) and (p).)

Under section 208 (i) provision is made for lists of eligibles to be certified by the Board of Review to the Secretary, said list to be valid for a period of at least one year. Said section reads as follows:

(i) The board shall certify to the secretary for each administrative district, and for the State as a whole, and shall rank such persons receiving a passing mark, and shall rank such persons in the order of magnitude commencing with the highest rating for the specified grade of employment. Such list shall be known as a list of eligibles and shall be valid until the next examination is held for the same grade of employment, but in no event for a period of less than one year, unless no more than two names remain on a list of eligibles, in which case a new examination may be held; but those whose names remained on the list of eligibles shall be retained on the new list for a period of at least one year from the date of their original certification.

It is obvious from the above provision that lists of eligibles must be retained for at least one year. If new examinations should be given before the end of the year, then the two or one names remaining on any list of eligibles must be retained on the new list for a period of at least one year from the date of the original certification.

It is well known that the most common civil service procedure adopts the measure of rescinding and voiding lists of eligibles after a period of one year, or at most, after two years. Since the examinations of the Bureau of Employment and Unemployment Compensation were given in August of 1937, and eligible lists are now more than three years old, it would seem that the Secretary might conclude that the various applicants who had been qualified at the time of the examination and the compiling of lists of eligibles in 1937 have not kept up with the new techniques developed in the field, and thus were unable to give to the Commonwealth the type of service now required. Furthermore, the wording of the act that lists shall be valid for at least one year is based on the civil service principle founded on experience that lists should be retained for one year, but outlive their usefulness after a period of one to two years. This is particularly true for the reason that by that time the better qualified eligibles have been appointed; in other words, the cream on the list has been drawn. Additionally, individuals on the depleted list are found not to be available for various reasons, namely, they have obtained other positions, changed their residence, died, etc. For such reasons, the secretary, within his discretion, could properly rescind the old lists in order to promote the efficient administration of this important State service.

If, in addition to the element of staleness of the lists of eligibles, the secretary has, within his discretion, positive and reliable information of the existence of fraud in the preparation or compilation of lists

of eligibles, he not only has the right but the duty to discard lists of eligibles. Authority for this conclusion that fraudulent eligible lists should be discarded is found in the recent case of *Hennessey et al. v. City of Philadelphia et al.*, 38 D. & C. Rep. 509, where Judge Flood said:

The commission was in our opinion correct in its conclusion that the list published on December 26, 1939, was in no real sense an eligible list. To use the powers of a court of equity to compel the commission to certify from a list so tainted throughout its entire length would be a mockery. \* \* \*

Where, as here, the irregularities are so widespread and it appears that fraud was perpetrated by some person or persons upon a large scale, we must agree with the commission's position that it could not certify from such a so-called eligible list, and that it was obligated to prepare a new and proper eligible list.

In the view of the foregoing, we are of the opinion, that under the provisions of the Pennsylvania Unemployment Compensation Law, the Act of December 5, 1936, P. L. 2897, as amended, 43 P. S. §§ 751 et seq. and The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. §§ 561-574 et seq., the Secretary of Labor and Industry, within his discretion, had the authority to issue Rule and Resolution No. 46, which rescinded and declared null and void as of July 12, 1940, classes and grades of employment listed in said rule and resolution.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 391

*Unemployment Compensation Law—Procedure for promotions under section 208 (j) Act of December 5, 1936, P. L. (1937) 2897.*

Once promotions have been made from the list of eligibles certified by the Unemployment Compensation Board of Review on the basis of previous service record in accordance with the Unemployment Compensation Law, the Secretary of Labor and Industry does not have the power or authority to cancel such promotions, and demote such employees except for just cause, as prescribed in section 208 (o) and (s) of the law. Since promotions have been made in accordance with the Unemployment Compensation Law, there is no power in the board to require examinations as to promotions already made.

Harrisburg, Pa., March 19, 1941.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of January 20, 1941, requesting advice as to procedure for promotions under Section 208 (j) of the Pennsylvania Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, as amended. Specifically, you ask the following questions:

(1) Does the Secretary of Labor and Industry have the power and authority to cancel a promotion made at a prior date, thereby demoting that employe to his former lower grade?

(2) If the answer to number 1 be in the affirmative, does the Secretary have the right or authority to make such cancellation retroactive to the time of the original promotion, or to a time subsequent thereto but prior to the date of cancellation?

(3) If the answer to number 2 be in the affirmative, does the Secretary have the right or authority either to withhold from the pay of such employe, or to demand from such employe reimbursement of the compensation received by him, and representing the difference between the salary of the lower grade from which he was promoted and the salary paid him in the higher grade to which he was promoted?

(4) If the answer to number 3 be in the negative, has the Secretary of Labor and Industry the power and authority to reimburse the Unemployment Compensation Fund (from State funds) for the amount representing the difference between the salaries attached to the lower grade from which the respective employe was promoted, and the salary actually paid that employe for the higher grade to which he was promoted?

(5) Where, in response to a reference thereof by you, the Board of Review has certified an employe to be "eligible" for promotion, and thereafter the Secretary has promoted that employe, has the Board of Review the authority subsequently to require that employe to submit himself to a competitive or qualifying examination and, on the strength thereof, revoke and withdraw its original certificate of eligibility already issued as to that employe?

If the answer to this question be "yes," and the board so notifies the secretary to that extent, is the secretary required or authorized to cancel the promotion already made of that employe and pass on the certificate issue by the board, prior to the holding of such qualifying or competitive examination?

The administration of unemployment compensation is governed by the provisions of the Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, as amended May 18, 1937, P. L. 658 and June 20, 1939, P. L. 458, 43 P. S. §§ 751 et seq., which act provides for the payment of unemployment compensation benefits to certain unemployed persons. The administration of this act is vested in the Department of Labor and Industry.

The Unemployment Compensation Law specifically requires that the personnel for the administration of the service shall be chosen on a civil service basis. Section 208 of the Unemployment Compensation Law outlines in detail the civil service provisions and requirements.

Promotions are definitely governed by Section 208 (j), as amended, 43 P. S. § 768, which directs:

The secretary shall make appointments to positions created under this act, and shall fill vacancies as they may occur from the lists of the eligibles certified to him by the board, except with respect to positions filled by promotions as hereinafter provided. \* \* \*

Vacancies in positions subject to the provisions of this section, whether such positions be newly created or vacated for any reason by any former incumbent, shall be filled, in so far as practical, by promotions from among employes holding positions in the lower grades. In all cases, an employe to be promoted shall possess the qualifications specified for the position, and shall have served not less than six months (including service during any probationary period, but not including service during any provisional employment) in a position under the provisions of this act. Promotions shall be based on merit and upon the superior qualifications of the employe to be promoted as shown by his or her previous service record under this act. The secretary may promote an employe to a higher position to which such employe has been certified as eligible by the board, provided that the board shall, in certifying such employe, satisfy itself that the employe possesses the qualifications prescribed by the secretary for the higher position. *Before making such certification, the board may require any employe or employes to take such qualifying or competitive examinations as the board may prescribe. (Italics ours.)*

From the foregoing provision, it is clear that promotions are based on merit and superior qualifications as determined by the previous service record of the employe. The provision relative to examinations is directory and not mandatory and, therefore, the giving of such examinations is entirely within the discretion of the Unemployment Compensation Board of Review. If the Board of Review, within its discretion, did not deem it advisable to require qualifying or competitive examinations, but certified employes as eligible for promotion on

the basis of their service record as prescribed by the act, the Secretary of Labor and Industry has the power and authority under the act to promote such persons certified as eligible by the board. Such employes cannot be demoted, dismissed or suspended except for just cause as prescribed by section 208 (o) and (s) of the Unemployment Compensation Law.

In view of the foregoing, we are of the opinion that once promotions have been made from lists of eligibles certified by the Unemployment Compensation Board of Review on the basis of previous service record in accordance with the Unemployment Compensation law, the Act of December 5, 1936, P. L. (1937) 2897, as amended May 18, 1937, P. L. 658 and June 20, 1939, P. L. 458, 43 P. S. §§ 751 et seq., you do not have the power or authority to cancel such promotions, and demote such employes except for just cause, as prescribed by section 208 (o) and (s) of the Unemployment Compensation Law, *supra*.

Since the answer to your first question is in the negative, it is unnecessary to answer your questions (2), (3) and (4).

As to question (5), as already stated, since promotions have been made in accordance with the Pennsylvania Unemployment Compensation Law, there is no power in the board to require examinations as to promotions already made.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 392

*Unemployment Compensation Board of Review—Promotional examinations—  
Eligible lists—Certification of entire list to Secretary of Labor and Industry—  
Rules and regulations—Act of December 5, 1936, P. L. (1937) 2897.*

Under section 208 (j) of the law, if the board, within its discretion, conducts qualifying or competitive promotional examinations limited to employes in the service who meet minimum qualifications of the Secretary of Labor and Industry, and are eligible for promotion on the basis of merit and upon the superior qualifications as shown by their previous service record, and establishes lists in accordance with such examinations, it is required to certify to the secretary the entire list of eligibles for each position for which a vacancy exists.

Harrisburg, Pa., March 19, 1941.

Honorable P. Stephen Stahlnecker, Chairman, Unemployment Compensation Board of Review, Department of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of February 5, 1941, requesting our opinion on certification procedure after the giving of promotional examinations and the establishing of eligible lists under the unemployment compensation civil service system. More specifically you inquire whether or not the Board of Review, after conducting promotional examinations and establishing eligible lists in accordance with such examinations, is required to certify to the Secretary the entire list of eligibles for each position, or whether rules and regulations may be promulgated providing for the certification of a specified number of names for each vacancy to be filled.

Unemployment compensation is governed by the provisions of the Unemployment Compensation Law, approved December 5, 1936, P. L. (1937) 2897, as amended May 18, 1937, P. L. 658 and June 20, 1939, P. L. 458, 43 P. S. §§ 751 et seq., which act provides for payment of unemployment compensation benefits to certain unemployed persons. The administration of the law is vested in the Department of Labor and Industry.

The Unemployment Compensation Law specifically requires that the personnel for the administration of the service shall be chosen on a civil service basis. Section 208, 43 P. S. § 768, of the Unemployment Compensation Law outlines in detail the civil service provisions and requirements. Under this section, duties of administration of the civil service sections of the act are imposed upon the Unemployment Compensation Board of Review, which is created under section 203 of the Unemployment Compensation Law, and upon the Secretary of Labor and Industry. The Board of Review, under section 203 (c) is made a departmental administrative board within the Department of Labor and Industry. Under section 208 (f), (g), (h), (i), (l) and (m) duties are imposed respecting administration of the civil service provisions of the act on the board as follows: Applications for employment are filed with the board, and civil service examinations are held by the board, which establishes and certifies lists of eligibles as a result of such examinations. The Secretary of Labor and Industry, under section 208 (e), (j) and (o) is charged with the following specific duties: Before applications for positions are filed with the board, the secretary is required to prescribe the qualifications to be possessed by persons desiring employment in the various grades of employment as will best promote the most efficient administration of

the act; original appointments and promotions are to be made by the secretary, and power of dismissal, suspension or furloughing of employes is also vested in the secretary.

Promotions are governed by section 208 (j), as amended, which directs:

The secretary shall make appointments to positions created under this act, and shall fill vacancies as they may occur from the lists of eligibles certified to him by the board, except with respect to positions filled by promotions as hereinafter provided \* \* \*.

Vacancies in positions subject to the provisions of this section, whether such positions be newly created or vacated for any reason by any former incumbent, shall be filled, in so far as practical, by promotions from among employes holding positions in the lower grades. In all cases, an employe to be promoted shall possess the qualifications specified for the position, and shall have served not less than six months (including service during any probationary period, but not including service during any provisional employment) in a position under the provisions of this act. Promotions shall be based on merit and upon the superior qualifications of the employe to be promoted as shown by his or her previous service record under this act. *The secretary may promote an employe to a higher position to which such employe has been certified as eligible by the board, provided that the board shall, in certifying such employe, satisfy itself that the employe possesses the qualifications prescribed by the secretary for the higher position. Before making such certification, the board may require any employe or employes to take such qualifying or competitive examinations as the board may prescribe.* (Italics ours.)

Before considering your question relative to certification from eligible lists, obtained through qualifying or competitive examinations, it is necessary to consider whether the board may give such promotional examinations. Since the particular provisions of the section relative to examinations in connection with promotions is clearly directory and not mandatory, the exercise of the power to give promotional examinations is within the discretion of the board. However, it should be noted that promotions must be made in compliance with section 208 (j) of the act which expressly states that all promotions must be based on merit and upon the superior qualifications of the employe as shown by his or her previous service record. In other words, the service record must be the basis of promotion. Therefore, promotional examinations must, of necessity, be limited to those employes actually employed for a period of not less than six months in the service of the Bureau of Employment and Unemployment Com-

pensation who definitely meet minimum qualifications, fixed by the secretary, and who are eligible for promotion on the basis of merit because their service record shows their superior qualifications.

After the giving of such examination, duly circumscribed and limited to those employes having superior qualifications as shown by their service record, and the compiling of eligible lists, you inquire whether the entire list, or a specified number of names for each vacancy to be filled, shall be certified.

It is to be observed that there is no express provision in this section 208 (j) of the Unemployment Compensation Law relating to promotions as to whether the board shall certify the entire list or shall limit its certification to the three highest available eligibles for the grade of employment.

Under section 214 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 74, the heads of the various administrative departments are given plenary power to appoint all employes and to fix compensation. The civil service provisions of the Unemployment Compensation Law, *supra*, limit the Secretary of Labor and Industry in his power of appointments in the unemployment compensation service to certain lists of eligibles certified by the Unemployment Compensation Board of Review. Lists are procured in accordance with section 208 of the Unemployment Compensation Law. The secretary cannot be further limited as to original appointments or promotions except by express enactment of the legislature. Limitations on the secretary's power to appoint or promote cannot be read into the act, nor can the provision relative to original appointments be engrafted upon the provisions relative to promotions. In the absence of express limitations, the Board of Review, after conducting promotional examinations and establishing eligible lists, is required to certify the entire list of eligibles for each position. As stated above, the promotional examinations should be given only to the employes in the service who meet minimum qualifications of the secretary and are eligible for promotion on the basis of merit and upon the superior qualifications as shown by their previous service record. This is in accordance with the provisions of section 208 (j) of the Unemployment Compensation Law.

In view of the foregoing, we are of the opinion that under section 208 (j) of the Unemployment Compensation Law, approved December 5, 1936, P. L. (1937) 2897, as amended May 18, 1937, P. L. 658 and June 20, 1939, P. L. 458, if the board, within its discretion, conducts qualifying or competitive promotional examinations limited to employes in the service who meet minimum qualifications of the secre-

tary and are eligible for promotion on the basis of merit and upon the superior qualifications as shown by their previous service record, and establishes lists in accordance with such examinations, it is required to certify to the secretary the entire list of eligibles for each position for which a vacancy exists.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 393

*Schools—Professional employes—Requirement of United States citizenship—Acts of July 1, 1937, and June 24, 1939—Effect on existing contracts—Dismissal for lack of citizenship—Teachers' Tenure Act of 1937—Certificate to teach—Permanent college certificate—Restrictions on grant or renewal.*

1. The Act of July 1, 1937, P. L. 2577, amending section 1202 of the School Code of May 18, 1911, P. L. 309, disqualifies anyone not a citizen of the United States from teaching in the public schools of Pennsylvania, except an exchange teacher or one employed to teach foreign languages, and is applicable even to one already holding a contract under the Teachers' Tenure Act of April 6, 1937, P. L. 213.

2. Education being a governmental function, the power of the legislature over it cannot be fettered, bargained away, or extinguished by the legislature, and any contract executed pursuant to legislative authority remains subject to change or regulation by future legislatures; neither teacher nor school district has any rights therein which cannot be altered by the legislature, and changes so made do not result in unconstitutional impairment of the contract.

3. The Act of July 1, 1937, P. L. 2577, amending section 1202 of the School Code of 1911, adds to the causes for lawful termination of a teacher's contract the lack of United States citizenship, and dismissal of a teacher for failure to become qualified in that respect is not in violation of the Teachers' Tenure Act of 1937, with which the Act of July 1, 1937, is to be construed in *pari materia*.

4. The Act of June 24, 1939, P. L. 794, amending section 1301 of the School Code of 1911, forbids the grant or renewal of a certificate to teach or of a permanent college certificate to anyone not a citizen of the United States, except exchange teachers and teachers of foreign languages.

Harrisburg, Pa., March 26, 1941.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: You have requested us to advise you of the effect of section 1301 of the Act of May 18, 1911, P. L. 309, as amended June 24, 1939, P. L. 794, 24 P. S. § 1221, and section 1202 of the same act, as amended July 1, 1937, P. L. 2577, 24 P. S. § 1122, upon certain situations.

Specifically, you desire to know:

1. What is the effect of section 1202 of the Act of May 18, 1911, as amended, *supra*, upon the contract of a teacher who, at the time the amendment to section 1202 became effective, was employed under the provisions of the Act of April 6, 1937, P. L. 213?

2. Does section 1301 of the Act of May 18, 1911, as amended, *supra*, forbid the renewal of a certificate to a teacher not a citizen of the United States, but who had obtained a certificate before the amendment of June 24, 1939, became effective?

3. Under section 1317 of the Act of May 18, 1911, P. L. 309, as amended May 29, 1931, P. L. 243, 24 P. S. § 1351, does the Superintendent of Public Instruction have authority to issue a permanent college certificate to a person who has been teaching under a provisional college certificate, and who has met all the requirements of said section, but who is not a citizen of the United States?

We shall take up and answer your questions *seriatim*.

1. Section 1202 of the Act of May 18, 1911, P. L. 309, 24 P. S. § 1122, was as follows:

Every teacher employed to teach in the public schools of this Commonwealth must be a person of good moral character, and must be at least eighteen years of age.

The amendment of July 1, 1937, P. L. 2577, changed section 1202 so that the same now reads as follows:

Every teacher employed to teach in the public schools of this Commonwealth must be a person of good moral character, must be at least eighteen years of age, and must be a citizen of the United States: Provided, however, That citizenship may be waived in the case of exchange teachers not permanently employed, and teachers employed for the purpose of teaching foreign languages.

The language of section 1202, as amended, *supra*, is clear and positive. There is no mistaking its intent and purpose. No teacher may be employed to teach in the public schools of the Commonwealth unless that teacher is a citizen of the United States, or unless the teacher comes within the exceptions of the proviso.

You desire to be advised whether a teacher who is not a citizen of the United States and who is under contract with a school district under the provisions of the Act of April 6, 1937, P. L. 213, is relieved

for the duration of his contract of the requirement of being a citizen of the United States. The Act of April 6, 1937, P. L. 213 (commonly known as the Teacher Tenure Act), amends sections 1201, 1205, 1205-A, 1214 and 1215 of the Act of May 18, 1911, P. L. 309, often called the School Code; repeals sections 1204 and 1208 of the said act of 1911; and provides in section 6 thereof that no contract in effect upon the date of its enactment shall be terminated except in accordance with the provisions of the act. The effective date was April 6, 1937.

The form of contract provided in the tenure act differed from that formerly required between school districts and teachers. The old form provided for renewal from year to year, unless terminated at the end of any term by either party by sixty days' notice. The district could terminate it without cause. The new form permits termination only for stipulated causes. The tenure act further states that no contract in effect at its enactment may be terminated except in accordance with the act's provisions. The causes, so far as this inquiry is concerned, for termination, were given as immorality, incompetency, intemperance, cruelty, wilful and persistent negligence, mental derangement, and persistent and wilful violation of the school laws.

Education is a governmental function, and the power of the legislature over it cannot be fettered, bargained away or extinguished by the legislature. Teachers' Tenure Act Cases, 329 Pa. 213 (1938). Consequently no legislature can set up an educational policy which future legislatures cannot change; and all matters such as contracts bearing on education or legislative determinations of school policy, are subject to future legislative control. Teachers' Tenure Act cases, *supra*. Contracts between teachers and school districts are, therefore, always subject to change or regulation by future legislatures; and changes, if made by the legislature, do not result in unconstitutional impairment of such contracts. *Id.* It follows that neither teachers nor school districts have any rights in their contracts which cannot constitutionally be altered by the legislature.

The result inescapably follows, also, that the legislature can change the qualifications required of a teacher in the public schools of the Commonwealth, and if it does so, any persons presently teaching in its schools cannot be heard to complain. If, by different requisite qualifications established by the legislature, a teacher becomes no longer qualified, his remedy is to become qualified. If he fails so to do, and his dismissal results, such dismissal is not the arbitrary sort against which the tenure act was meant to protect him. See *Wilson et ux. v. Philadelphia School District et al.*, 328 Pa. 225 (1937).

It would appear to be well settled that the State has plenary power to prescribe a curriculum for educational institutions which it supports. It would seem that the power of the State would extend also to complete regulation of the qualifications of teachers who teach in its schools. See *Meyer v. Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 67 L. ed. 1042, 29 A.L.R. 1446 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U. S. 510, 45 S. Ct. 571, 69 L. ed. 1070, 39 A. L. R. 468 (1925); and *Minersville School District v. Gobitis et al.* 310 U. S. 586, 84 L. ed. 1375 (1940).

It is our opinion, therefore, that when the General Assembly, by the Act of July 1, 1937, P. L. 2577, amended section 1202 of the Act of May 18, 1911, P. L. 309, it added to the causes for lawful termination of teachers' contracts the lack of United States citizenship.

It may be noted here that the tenure act became effective April 6, 1937, the date of its approval by the Governor; and that the 1937 amendment to section 1202 of the act of 1911, requiring citizenship, was approved July 1, 1937, and became effective September 1, 1937. Act of May 17, 1929, P. L. 1808, as amended June 10, 1935, P. L. 293, 46 P. S. § 155 (since repealed by the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019). The Act of April 6, 1937 and that of July 1, 1937, are, of course, in *pari materia*; and they are, therefore, to be construed together, if possible, as one law. In *re Palmer's Appeal*, 307 Pa. 426 (1932).

It is possible to construe the aforesaid acts together, as we have already demonstrated. The requirement of citizenship, of course, became effective only from and after September 1, 1937; but from and after that date, it became a positive qualification of anyone who wished to teach in the public schools of the Commonwealth.

2. Section 1301 of the Act of May 18, 1911, P. L. 309, as amended June 24, 1939, P. L. 794, 24 P. S. § 1221, is as follows:

Every teacher in the public schools of this Commonwealth must hold a provisional, professional or State certificate, which shall set forth the branches which its holder is entitled to teach, and which shall be issued as herein provided; but no teacher shall teach, in any public school in this Commonwealth, any branch which he has not been properly certified to teach.

A certificate to teach shall not be granted or issued to any person not a citizen of the United States, except in the case of exchange teachers not permanently employed and teachers employed for the purpose of teaching foreign languages.

This act became effective from and after September 1, 1939. Statutory Construction Act, *supra*.

The foregoing language is also clear and positive. The word "shall" is mandatory. See *Ehret v. Kulpmont Borough School District*, 333 Pa. 518 (1939). A certificate to teach *shall not* be granted or issued to one not a United States citizen, with specified exceptions. None of these exceptions provides that a non-citizen already in possession of a certificate may be granted one, or a renewal of the one already possessed. *Inclusio unius est exclusio alterius*.

It follows that no certificate to teach may be granted (except to exchange teachers and teachers of foreign languages) to anyone not a citizen of the United States. From the foregoing discussion under Question No. 1, herein, it also follows that one already in possession of a certificate on September 1, 1939, and who was not then a United States citizen, and who has not since become one, has no right to a renewal of his certificate. The object and educational policy of the legislature were to require *all* teachers to be United States citizens, not just new teachers.

3. The same reasoning applies to Question No. 3. The language of section 1317 of the Act of May 18, 1911, P. L. 309, as amended May 20, 1921, P. L. 1041 and May 29, 1931, P. L. 243, 24 P. S. § 1351, is as follows:

The Superintendent of Public Instruction shall issue a permanent college certificate to every graduate of a college or university approved by the State Council of Education of the Commonwealth of Pennsylvania, and of such departments therein as are approved by him, when such graduate furnishes satisfactory evidence of good moral character and successful experience of three years' teaching in the public schools of this Commonwealth on a provisional college certificate, and has completed such work in education as may be approved by the State Council of Education, which certificate shall entitle its holder to teach without further examination.

Under the foregoing provision, when a graduate of an approved college or university furnishes satisfactory evidence of good moral character and successful experience of three years' teaching in the public schools on a provisional college certificate, and has completed other required work, the Superintendent of Public Instruction shall issue to such teacher a permanent college certificate which entitles its holder to teach without further examination. However, one of the requirements which must be read into this provision is that of the citizenship required by section 1301 of the act of 1911, as amended, *supra*.

It follows that one who is teaching under a provisional certificate under section 1317 of the act of 1911, as amended, *supra*, and who is not a citizen, must become a United States citizen before a permanent

college certificate may be issued to him. Such teacher has no absolute right to such certificate; he has not yet received it; and before he can, he must comply with the requirements of citizenship.

Indeed, after September 1, 1939, the effective date of the amendment to section 1301 of the act of 1911, *supra*, even a provisional certificate to teach in the public schools may not be issued to one who is not a citizen of the United States; and if a provisional certificate has been issued to a teacher not a United States citizen prior to September 1, 1939, after said date and until such teacher becomes a United States citizen, said certificate is no longer valid.

We are of the foregoing opinion despite the language of *Scheivner v. Baer*, 174 Pa. 482 (1896), wherein it was said that a certificate granted to a teacher is a license to pursue a certain avocation [sic] which, without such license, he could not pursue, and that the right during the period for which the certificate is granted to him, is a valuable property right. The court goes on to say that a teacher cannot be deprived of this certificate except by *judicial* proceeding. In view of the other and later authorities herein cited, and in view of the fact that the *Scheivner* case has not been followed on the specific question involved, that case cannot be considered as controlling in our present discussion, nor can it be considered as valid authority contrary to our conclusions herein expressed; for we have concluded that in the matters here dealt with at least, what the legislature has given, the legislature may take away.

It is our opinion, therefore, and you are accordingly advised:

1. A teacher, other than an exchange teacher or one employed to teach foreign languages, who, on April 6, 1937, the effective date of the Teachers' Tenure Act of April 6, 1937, P. L. 213, was under contract with a public school district of this Commonwealth, and who was not at such time a citizen of the United States, is no longer protected by such contract, and is no longer qualified to teach in the public schools of the Commonwealth until he has become a United States citizen.

2. Section 1301 of the Act of May 18, 1911, P. L. 309, as amended June 24, 1939, P. L. 794, precludes the renewal of a certificate to teach in the public schools of the Commonwealth of any person who is not a citizen of the United States, on and after September 1, 1939.

3. Since September 1, 1939, the effective date of the amendment of May 29, 1931, P. L. 243, to section 1317 of the Act of May 18, 1911,

P. L. 309, the Superintendent of Public Instruction has had no authority to issue a permanent college certificate to anyone who is not a citizen of the United States.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 394

*Undertakers—Licensure—Educational qualifications—Time of determination—  
Act of June 10, 1931.*

Under the Act of June 10, 1931, P. L. 485, the educational requirements prescribed for one seeking a license as an undertaker are to be determined as of the date when such applicant presents himself for examination by the State Board of Undertakers and not when he registers as an undertaker's assistant or as a student apprentice.

Harrisburg, Pa., March 27, 1941.

Honorable John J. Shaw, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether educational requirements of applicants for licenses to practice undertaking are to be determined as of the time the applicants present themselves for examination, or as of the time such applicants registered as undertakers' assistants or as student apprentices.

The first regulation of undertakers in Pennsylvania was apparently by the Act of June 7, 1895, P. L. 167. This statute was amended April 24, 1905, P. L. 299; March 30, 1925, P. L. 92; May 13, 1927, P. L. 1005; and April 25, 1929, P. L. 772; 63 P. S. §§ 471-477, 71 P. S. §§ 1161-1164.

The Act of 1895, as amended, *supra*, which related to undertaking in cities of the first, second and third class, provided that thereafter anyone engaged in the business of undertaking must apply to the State Board of Undertakers for a license, take and pass an examination, and possess, among other qualifications, after January 1, 1928 an education of or equaling one year of high school work, after January 1, 1929 an education of or equaling two years of high school work, after January 1, 1930 an education of or equaling three years of high

school work, after January 1, 1931 an education of or equaling complete high school work, and two years' experience in the undertaking business. The requirement of high school education or its equivalent was added to the statute by the amendment of May 13, 1927, *supra*.

The act of 1895 also required, by the amendment of March 30, 1925, *supra*, that every person employed as an undertaker's assistant who was not licensed as an undertaker must register with the board. The amendment of May 13, 1927, shifted the burden of registration of undertakers' assistants from such assistants to the employers.

By the Act of June 10, 1931, P. L. 485, 63 P. S. § 478a et seq., the regulation of undertaking was extended throughout the Commonwealth. This statute did not expressly repeal the act of 1895 or its amendments, but did contain a repealer of all inconsistent acts and parts of acts. The act of 1931 was amended by the Acts of June 21, 1935, P. L. 398 and July 19, 1935, P. L. 1324.

The act of 1931 speaks of student apprentices and defines the term to mean any person operating under and with an undertaker for the purpose of learning the business to the end that such person may become a licensed undertaker. The act also requires anyone not holding a license on its effective date, September 1, 1931 (Act of May 17, 1929, P. L. 1808, 46 P. S. § 155), to make application to the board for examination and licensure, and be licensed by the board, before operating as an undertaker. Persons or corporations holding licenses under existing laws are entitled to the renewal of such licenses without examination, as provided in the act.

One of the qualifications for examination for licensure is that an applicant must be a graduate of an approved high school of the Commonwealth, or have an education equivalent thereto; and all applicants must have two years' practical experience as student apprentices.

The act also provides that every student apprentice shall register with the board annually.

It is clear from the foregoing that after September 1, 1931 no one may engage in the undertaking business in Pennsylvania unless licensed to do so by the State Board of Undertakers. It is just as clear that the qualifications of applicants for examination are to be determined as of the time such applicants take such examinations, unless the act of 1931 otherwise provides. The act does not otherwise provide. It follows that educational requirements of applicants for licenses are to be determined as of the time the applicants present

themselves for examination. The time such applicants registered as undertakers' assistants or as student apprentices, in so far as educational requirements for licenses are concerned, is immaterial.

It is our opinion, that under the Act of June 10, 1931, P. L. 485, as amended, the educational requirements of applicants for licensure as undertakers in this Commonwealth are to be determined as of the time such applicants present themselves for examination by the State Board of Undertakers.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 395

*Accountants—"Certified public accountant"—Right to use term—Grant of certificates in another State—Use of term in Pennsylvania—Act of March 29, 1899, as amended.*

1. Under the Act of March 29, 1899, P. L. 21, as amended by the Acts of April 27, 1909, P. L. 256, June 4, 1915, P. L. 839, and May 24, 1921, P. L. 1073, no one other than a person holding a certificate as a certified public accountant granted pursuant to those statutes may lawfully describe himself in Pennsylvania as a "certified public accountant," "C. P. A.," or any equivalent thereof, or be so designated in the literature of a Pennsylvania educational institution of which he is a member of the faculty.

2. It is unlawful for a certified public accountant of another state, who does not hold a certificate in Pennsylvania, to assume or use in this State the designation of "certified public accountant," "C. P. A.," or any equivalent thereof, even with a parenthetical reference to the state in which his certificate was received.

Harrisburg, Pa., April 1, 1941.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: By your communication of February 24, 1941, you request us to advise you upon certain factual situations which you conceive to arise under the provisions of the Act of March 29, 1899, P. L. 21, as amended April 27, 1909, P. L. 256, June 4, 1915, P. L. 839, and May 24, 1921, P. L. 1073, 63 P. S. § 1 et seq., relating to certified public accountants.

The situations you request advice upon are as follow:

1. If a person does not hold a certificate as a certified public accountant granted under the laws of the Commonwealth of Pennsylvania but is the holder of a certificate issued in compliance with the laws of another state, may that person legally assume and use (a) the designation "C.P.A.", for example "John Smith, C.P.A." or (b) the designation "C.P.A." together with a parenthetical statement as to the State from which his certificate was received, for example "John Smith, C.P.A. (N.Y.)"?

2. If a member of the faculty of a Pennsylvania educational institution does not hold a certificate as a certified public accountant granted under the laws of the Commonwealth of Pennsylvania but is the holder of a certificate issued in compliance with the laws of another state, is there a violation of laws of the Commonwealth of Pennsylvania if the educational institution, for the purpose of indicating the faculty member's scholastic attainment, lists the name of such faculty member in its catalogs and other published bulletins and pamphlets using thereafter or thereunder (a) the designation "C.P.A.", for example "John Smith, C.P.A.," or (b) the designation of "C.P.A." with a parenthetical statement as to the state from which his certificate was received, for example, "John Smith, C.P.A. (N.Y.)"?

3. Would the fact that the educational institution was (1) a state or public institution or (2) a private school run for the profit of its owners, make any difference in the answer to the foregoing question?

Section 1 of the act of 1899, *supra*, is as follows:

Any citizen of the United States residing or having an office for the regular transaction of business in the state of Pennsylvania, being over the age of twenty-one years and of good moral character, and who shall have received from the governor of the state of Pennsylvania a certificate of his qualification to practice as a public expert accountant, as hereinafter provided, shall be designated and known as a certified public accountant, and no other person shall assume such title, or use the abbreviation C. P. A., or any other words, letters or figures to indicate that the person using the same is such certified public accountant. Every person holding such certificate, and every co-partnership of accountants, every member of which shall hold such certificates, may assume and use the title of certified public accountants, or the abbreviation thereof, C. P. A.: Provided, That no other person or copartnership shall use such title or abbreviation, or other words, letters or figures, to indicate that the person or co-partnership using the same is such certified public accountant.

Section 2 of said act provides in part:

\* \* \* certified public accountants of other States of the United States, who have been certified for at least one year, may be recommended for certification, at the discretion of the said board, for certificates without any examination.

Section 5 of the act is as follows:

If any person shall hold himself out as having received the certificate provided for in this act, or shall assume to practice thereunder as a certified public accountant, or use the initials C. P. A., without having received such certificate, or after the same shall have been revoked, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not exceeding five hundred dollars.

We shall answer your questions, in the light of the legislation hereinbefore cited, and quoted in part, seriatim.

1. A person who does not hold a certificate of his qualification to practice as a public expert accountant issued under the provisions of the Act of March 29, 1899, as amended, *supra*, may not, in Pennsylvania, legally use the designation "C. P. A.", either with or without a parenthetical statement thereafter designating another state wherein such person did receive a certificate as a certified public accountant. See letter from this department, written by Deputy Attorney General William I. Swoope, dated December 14, 1921, to Horace P. Griffith, President of the Pennsylvania State Board of Examiners of Public Accountants.

If a person, otherwise qualified under the Act of 1899, as amended, *supra*, who does not possess the certificate therein provided for, but who has been certified as a public accountant for at least one year by another state, desires legally to use the designation "C. P. A." in Pennsylvania, he must first be recommended to the Governor for certification under said act by the board.

2. The answer to Question No. 2 is the same as to No. 1, *supra*. What the Act of 1899, as amended, forbids, is the *use* of the initials "C. P. A." without having received the certificate stipulated in the act. It matters not who such person is, a teacher or a practicing accountant; what does matter is whether he uses or does not use the designation "C. P. A." in accordance with the provisions of the act.

3. The answer to Question No. 3 is already clear: It makes no difference.

It is our opinion that no one who does hold the certificate provided for in the Act of March 29, 1899, as amended, may, in Pennsylvania,

legally use the designation "C. P. A.", with or without a parenthetical statement thereafter to the effect that the right to use said designation was acquired in a state other than Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 396

*State Board of Examiners for the Registration of Nurses—Authority to make certain rules and regulations.*

The board may not validly adopt a rule and regulation which forbids an institution conducting an accredited school for the education of nurses who will be eligible for registration in Pennsylvania at the same time to conduct a school for the training of subsidiary workers. The board may validly adopt a rule and regulation which requires the residence of a physician either as resident or interne in an institution which conducts an accredited school for the education of nurses who will be eligible for registration in Pennsylvania.

Harrisburg, Pa., April 23, 1941.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: You have requested us to advise you concerning the authority of the State Board of Examiners for the Registration of Nurses to make certain rules and regulations. Specifically you inquire whether the board may adopt and enforce the following rules:

1. No institution conducting an accredited school for the education of nurses who will be eligible for registration in Pennsylvania may at the same time conduct a school for subsidiary workers.
2. In each hospital conducting an accredited school for nursing there shall be a physician in residence either as resident or interne.

The State Board of Examiners for the Registration of Nurses was created by the Act of May 1, 1909, P. L. 321, as amended and supplemented by the Acts of June 4, 1915, P. L. 809; June 20, 1919, P. L. 545; May 23, 1923, P. L. 351; June 8, 1923, P. L. 683; May 13, 1927, P. L. 988; and April 29, 1935, P. L. 93, 63 P. S. §§ 191-210; 71 P. S. §§ 1151-1156.

The foregoing legislation provides in section 3 of the Act of May 1, 1909, as amended, supra, 71 P. S. § 1153, that the board shall establish bylaws and regulations for its own government and for the execution of the provisions of the act. Section 1 of the Act of May 13, 1927, as amended by the Act of April 29, 1935, supra, 71 P. S. § 1156, provides that the board shall establish bylaws and regulations, not inconsistent with law, for its own government and for the execution of all of the laws which it is its duty to enforce or administer.

The legislation also provides that the board shall regulate the registration and certification of registered nurses and licensed attendants, but nothing therein contained refers to "subsidiary workers", which you mention in Question No. 1. Indeed, the foregoing legislation provides that it shall not be construed so as to affect in any way the right of any persons to nurse gratuitously or for hire, and that the purpose of the legislation is to secure the registration only of individuals who are qualified to be registered nurses or licensed attendants. Section 9 of the Act of May 1, 1909, as amended, 63 P. S. § 193.

It follows from this that power and authority are given to the board over the regulation and registration of persons who are in training to become registered nurses or licensed attendants only, and that no authority is given to the board to regulate or to supervise the training of other persons in the nursing field, such as subsidiary workers. From the information you submitted to us, we understand the term "subsidiary workers" to mean those who have had training in short courses for nursing, but who do not qualify for registration as registered nurses or licensed attendants; for example, in a certain hospital in Philadelphia which conducts an accredited school of nursing, there has been established a school to train individuals by giving them an eight months' course in nursing. The avowed purpose of such schools is apparently to train individuals to qualify as practical nurses or household helpers so that they may supply a need experienced by families whose incomes do not permit them to employ registered nurses. It is our understanding that this sort of training is encouraged and supported financially by the National Youth Administration of the Federal Government.

The legislation hereinbefore cited also provides that the board has the authority and duty to approve training schools or combinations of training schools which give pupil-nurses a full and adequate course of instruction. The board is also to prescribe a course of training to be required of applicants for registration as licensed attendants, and such applicants must furnish evidence satisfactory to the board that they have completed the prescribed course or its equivalent in some institution for the mentally sick, in a convalescent home, or in any institution of a similar nature *not having a school of nursing*.

There is nothing in the legislation about training schools for subsidiary workers, nor is anything therein contained which indicates that an institution conducting an accredited school of nursing or one for licensed attendants may not at the same time conduct a school for the training of subsidiary workers. The only reference in the statute to such a situation is the one above mentioned, that an institution which conducts an accredited school of nursing may not at the same time conduct a school for the training of licensed attendants. See section 9 of the Act of May 1, 1909, as amended June 20, 1919, P. L. 545, 63 P. S. § 193, and section 4 of the Act of May 13, 1927, P. L. 988, as amended April 29, 1935, P. L. 93, 63 P. S. § 203.

The subject legislation also provides that the board must approve schools or combinations of schools which train persons as registered nurses.

The authority hereinbefore mentioned which empowers the board to make rules and regulations not inconsistent with law, for the execution of all of the laws which it is its duty to enforce or administer, would clearly empower the board to set up reasonable rules and regulations governing schools of nursing, with which such schools would have to comply before obtaining approval from the board. Since the object of such schools is to graduate persons qualified to become registered nurses, any regulations or rules of the board would necessarily be confined to matters in training schools which relate to the training of prospective registered nurses. So long as a school of nursing trains its nurses satisfactorily to the board, there would appear to be no reason why such a school should not be allowed to train individuals hereinbefore designated as subsidiary workers. Any regulation of the board directed to training schools for nurses must have a reasonable relation to the purpose for which the board is authorized to approve such schools. This purpose is the training of nurses, not subsidiary workers. So long as a training school properly trains nurses, there is no apparent reason why it cannot at the same time train subsidiary workers.

While the legislation gives the board authority to approve schools, it does not give the board authority arbitrarily to withhold such approval; and inasmuch as the legislature has not forbidden an institution which operates a training school for nurses at the same time to train subsidiary workers, it is not for the board so to do. It is a matter of divided opinion whether the training of subsidiary workers in an institution which operates a training school for nurses interferes with the training school for nurses. If anybody is to crystallize the opinions of either side of this controversy that body must be the legislature or a court, not the board. The duty of the board is to regulate

and administer, not to legislate. For the board arbitrarily to say that an institution may not conduct a school of nursing and obtain the board's approval thereof, if such institution at the same time trains subsidiary workers, is to make an asseveration which has neither the sanction of law nor the support of opinion generally. If such a position is to be announced it must at least have the authority of legislation to back it up. We conclude that the board had and has no authority to make any regulation which forbids an institution conducting a school of nursing at the same time to train other individuals who expect to engage in nursing in positions less exalted than those of registered nurses.

Your Question No. 2 presents an entirely different situation. A requirement of the board that any institution conducting an accredited school for nursing must have a physician in residence either as resident or interne is obviously a reasonable regulation. As we understand it, the board is of opinion that unless an institution conducting an accredited school of nursing has a physician in attendance at all times the lives and well-being of patients are jeopardized in that nurses are sometimes obliged to assume responsibilities for which they are not qualified legally or educationally.

In short, if anything at all is to be done for patients in emergencies when no physician is in attendance, it must be done by the nurses, which may result in the nurses practicing medicine, something which they are neither qualified by education, nor permitted by law, to do. At the same time, it can hardly be expected that nurses will receive proper training unless they receive appropriate medical instruction; and such instruction cannot be given by anyone except a qualified physician. For nurses properly to be trained requires the presence and instruction of those qualified to train them. No one but a physician is qualified to train nurses in certain aspects of their nursing education. We conclude that this regulation is valid.

It is our opinion, that the State Board of Examiners for the Registration of Nurses may not validly adopt a rule and regulation which forbids an institution conducting an accredited school for the education of nurses who will be eligible for registration in Pennsylvania at the same time to conduct a school for the training of subsidiary workers. It is also our opinion and you are further advised, that said

board may validly adopt a rule and regulation which requires the residence of a physician either as resident or interne in an institution which conducts an accredited school for the education of nurses who will be eligible for registration in Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 397

*Undertakers—Licensure—Revocation or suspension of license—Reinstatement—Fees chargeable—Act of June 7, 1895, June 10, 1931, and May 20, 1937.*

1. Not decided, whether the Act of June 10, 1931, P. L. 485, regulating undertaking throughout the Commonwealth, repealed the Act of June 7, 1895, P. L. 167, and its amendments, regulating undertaking in cities in the first, second and third classes.

2. The State Board of Undertakers has no power to reissue or reinstate a license previously revoked by it, but one whose license has been revoked, if he desires a new license, must apply to the board just as any applicant who has never had a license: the board may, however, reinstate a license which it has merely suspended.

3. Under section 7 of the Act of June 10, 1931, P. L. 485, the State Board of Undertakers may in its discretion renew a lapsed license at any time it desires, but it has no authority to charge a person whose license has lapsed and later been renewed any fees for the intervening lapsed period.

4. The Act of May 20, 1927, P. L. 727, providing that whenever an act of assembly conditions the right to practice any profession upon the annual renewal of a license for which a fee is required the department shall collect from the licensee, in addition to the fee for the current year, the full amount for all fees and penalties for preceding years, unless the applicant proves to the satisfaction of the department that he actually did not practice his profession during the lapsed period, applies only to licenses granted by the Department of Public Instruction and not to those granted by the Department of Health.

Harrisburg, Pa., April 24, 1941.

Honorable John J. Shaw, Secretary of Health, Harrisburg, Pennsylvania.

Sir: By two communications dated March 20, 1941, the State Board of Undertakers has requested our opinion upon two questions. These questions are:

1. Has the board power to reinstate or reissue an undertaker's license to one whose license it has previously revoked?

2. May the board, when it renews a license which had been allowed to lapse, charge the licensee fees for the period of lapse equal to what such person would have had to pay during that period if he had not allowed his license to lapse?

It is necessary in answering the above two questions to propound and answer a third, which you have not asked, namely, Does the board have power to reinstate a lapsed license?

The business of undertaking became regulated in cities of the first, second and third class, by the Act of June 7, 1895, P. L. 167. This act was amended April 24, 1905, P. L. 299; March 30, 1925, P. L. 92; May 13, 1927, P. L. 1005; and April 25, 1929, P. L. 772; 63 P. S. §§ 471-477; 71 P. S. §§ 1161-1164.

By the Act of June 10, 1931, P. L. 485, 63 P. S. § 478a et seq., the legislature extended the regulation of undertaking through the Commonwealth. This act did not expressly repeal the act of 1895 or its amendments, but it did provide for the repeal of all laws and parts of laws inconsistent therewith. The act of 1931 was amended June 21, 1935, P. L. 398 and July 19, 1935, P. L. 1324.

All of the foregoing legislation is in *pari materia*. It is not necessary for the purpose of this opinion to decide whether the act of 1931 repealed the act of 1895 and its amendments.

Section 6 of the Act of June 7, 1895, as amended, *supra*, 63 P. S. § 473, provides in part as follows:

Said board shall have full power at any time, to revoke any licenses theretofore granted, on proper cause and after full hearing of all the parties in interest.

Nothing is contained in the act of 1895, as amended, relating to the reinstatement or reissuance of revoked licenses.

The Act of June 10, 1931, as amended, *supra*, provides in section 8 that the board may refuse to renew a license, or may suspend or revoke a license, for certain stated reasons. Section 9 of the act provides for hearing before the board before any license is refused, suspended or revoked; and section 10 of the act provides for appeals from decisions of the board to the courts.

Nor is anything contained in the act of 1931, as amended, relating to the reissuance or reinstatement of a revoked license.

The State Board of Undertakers is a creature of the legislature and is vested only with the powers conferred upon it by statute, and

with such powers as are necessarily implied from powers specifically granted. In such a situation, where powers are conferred upon an extra judicial body, not in the course of the common law, the legislative grant of any particular power must be clear. See *Day v. Public Service Commission et al.*, 312 Pa. 381 (1933).

Let us examine some similar legislation.

Section 11 of the Act of July 12, 1919, P. L. 933, as amended, 63 P. S. § 26, relating to architects, provides that the State Board of Examiners of Architects may, within a certain period, issue a new certificate to practice architecture to one whose certificate has been revoked or suspended.

Section 12 of the Act of May 6, 1927, P. L. 820, 63 P. S. § 142, relating to engineers, provides that the State Registration Board for Professional Engineers may, under certain conditions, reissue a certificate to one whose certificate has been revoked.

Section 9 of the Act of March 30, 1917, P. L. 21, as amended, 63 P. S. § 237, relating to optometrists, provides that the State Board of Optometrical Examiners may, for certain causes, remove the revocation or suspension of a certificate of licensure.

Section 14 of the Act of March 19, 1909, P. L. 46, as amended, 63 P. S. § 271, relating to osteopaths, provides that the State Board of Osteopathic Examiners may, under certain given conditions, remove the suspension of a license.

Section 12 of the Act of June 3, 1911, P. L. 639, as amended, 63 P. S. § 410, provides that the State Board of Medical Education and Licensure may, for certain designated reasons, remove the revocation or suspension of a license.

Section 11 of the Act of May 1, 1929, P. L. 1216, 63 P. S. § 441, the Real Estate Brokers License Act of 1929, provides that the Department of Public Instruction may in its sole discretion issue a new license to a person whose license has been revoked after a period of one year from the date of revocation.

Section 11 of the Act of May 13, 1927, P. L. 988, as amended, 63 P. S. § 210, relating to nurses, provides that the State Board of Examiners for the Registration of Nurses may suspend, revoke or restore a certificate of registration for sufficient cause.

The Dental Law, the Act of May 1, 1933, P. L. 216, as amended, 63 P. S. § 120 et seq., provides that the State Dental Council and Examining Board may reinstate licenses which it has previously suspended or revoked.

It will be noted that all of the foregoing legislation expressly provides either for the reissuance or reinstatement of a license previously revoked or suspended, or for the granting of a new license to a person whose license has been previously suspended.

The Act of March 29, 1899, P. L. 21, 63 P. S. § 1 et seq., relating to accountants, provides for the revocation of a certificate, but not for the reissuance or reinstatement thereof.

Section 3 of the Act of May 26, 1921, P. L. 1172, 63 P. S. § 363, relating to pharmacists provides that the State Board of Pharmacy may suspend or revoke a permit, but says nothing about the removal of such suspension or revocation.

From the foregoing review of legislation relating to licenses, it will be seen that some expressly provides for the removal of suspension or revocation, while some does not. It is our conclusion, therefore, that if the legislature intends an administrative body to have the power to reissue a license once revoked, or to remove a suspension or revocation of a license, it will say so in express language. See also *Day v. Public Service Commission et al.*, supra.

We further conclude, therefore, that the State Board of Undertakers has no power to reissue or reinstate a license previously revoked by it, nor may said board remove such revocation except as hereinafter set forth. A suspended license may be reinstated, because the very word suspension implies a temporary cessation of effect. If one whose license has been *revoked*, however, desires a new license, he must apply to the board just as any applicant would who had never had a license.

We shall answer questions numbers two and three in inverse order. Section 7 of the Act of June 10, 1931, supra, 63 P. S. § 478g, provides that all undertakers' licenses granted under the act or existing laws shall expire on the first of February following their issuance or renewal; and that renewal of such licenses may be effected at any time during the month of January preceding their expiration upon the filing of an application for renewal. This section contains a proviso that the board may, in its discretion, renew the license of any undertaker who has failed to make application for renewal before February 1st.

By the plain words of section 7 of the act of 1931, supra, the State Board of Undertakers may renew the license of any undertaker who fails to apply for renewal before the expiration thereof, in its sole discretion, at any time. This means that a lapsed license may be renewed at any time the board, in its discretion, *desires* to renew it.

Nothing is said in the legislation pertaining to undertakers, however, about charging a person whose license has lapsed, and whose license

has later been renewed, any fees for the intervening lapsed period. It follows that no such fees can be charged. The only fees which can be charged are those provided by pertinent legislation, which are for the time a license is actually in existence and effect.

It appears from information supplied us that the State Board of Undertakers has been proceeding upon the assumption that when an undertaker allowed his license to lapse, and later applied for a renewal thereof, he had operated in the meantime without a license; and that therefore such person should pay a license fee for the time during which he did not have a license. We are aware of no ground for such an assumption. On the contrary, the legal presumption is that an undertaker does not engage in the business of undertaking unless he is licensed to do so. If a person engages in the undertaking business without the proper license, and in violation of the pertinent legislation, he is guilty of a misdemeanor and subject to fine and imprisonment, or both. The assumption, that a person once lawfully engaged in the business of undertaking under a proper license and who then allowed his license to lapse and thereafter made application for renewal of his license, unlawfully continued in the business in the meantime, is unwarranted.

We are not unmindful of the Act of May 20, 1937, P. L. 727, 71 P. S. § 1025. This statute provides that whenever an Act of Assembly conditions the right to practice any profession, etc., upon the annual renewal of a license granted by the Department of Public Instruction, for which renewals a fee is required to be paid, that department shall collect from the person licensed, in addition to the fee for the current year, the full amount of all fees and penalties for preceding years which the applicant for renewal has theretofore failed to pay, unless the applicant proves to the satisfaction of the department that he actually did not practice his profession during the lapse period, in which case no fees for such time shall be collected. However, this act does not apply to the Department of Health: it applies only to the Department of Public Instruction. If the General Assembly had intended the act to apply to departments other than the Department of Public Instruction it would have said so.

It is our opinion, therefore, that: 1. The State Board of Undertakers has no authority to reinstate or reissue a license once revoked. It has authority to entertain an application for a new license from a person whose license has been revoked, and such person shall be treated the same as one who never had a license. The board may remove the *suspension* of a license.

2. The State Board of Undertakers may in its discretion renew the license of any undertaker who has allowed the same to lapse by failure to apply for renewal thereof.

3. The State Board of Undertakers may not exact a fee equivalent in amount to a license fee, from any person whose license has lapsed and whose license has thereafter been renewed, for the period of time intervening between the lapse of such license and its renewal.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 398

*Commodity Act—Standardized glasses for the dispensation of alcoholic beverages sold in bars and restaurants doing business in Pennsylvania—Responsibility of the Secretary of Internal Affairs.*

There is no duty imposed by law upon the Secretary of Internal Affairs to insist on standardization of glasses for the dispensation of alcoholic beverages.

Harrisburg, Pa., May 7, 1941.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs,  
Harrisburg, Pennsylvania.

Sir: You have asked for an opinion as to whether the Act of July 24, 1913, P. L. 965, Section 2, 76 P. S. § 242, called the "Commodity Act," imposes upon the Department of Internal Affairs the duty of insisting upon standardized glasses for the dispensation of alcoholic beverages sold in bars and restaurants doing business in the Commonwealth.

Section 2 of said acts reads as follows:

All liquid commodities when sold in bulk or from bulk, shall be sold by weight or liquid measure. \* \* \*

Section 1 of said act states:

The word "commodity," as used in this act, shall be taken to mean any tangible personal property sold or offered for sale.

The language of section 2 of the act is broad enough to cover any sale of a liquid commodity and if the legislature in using the words "bulk" and "from bulk" contemplated the regulation of glasses used in the sale of alcoholic beverages in small quantities, then such sale must be by measure. But if the intention of the legislature was not to include such sales within the purview of the act, then the act is not applicable.

Since early times the sale of alcoholic beverages in Pennsylvania has been regulated by special acts of the legislature. In the case of *Schlaudecker v. Marshall et al.*, 72 Pa. 200 (1872), at page 203, the Supreme Court said:

The initial point of modern legislation on the subject of licenses may very properly be said to be the Act of 11th March 1834, P. L. 117, \* \* \*

If the legislature in any of the acts licensing the dispensation of alcoholic beverages intended to confer upon any department, board or agency the power of standardizing containers used in the sale thereof, it could easily have said so explicitly. However, a careful search of such legislation fails to disclose any such power explicitly expressed.

Section 4 of the Act of July 24, 1913, P. L. 965, 76 P. S. § 244, provides that:

It shall be unlawful, in selling any commodity, to use any measure unless the same shall have thereon marked in distinct letters and figures the capacity thereof.

Therefore, strictly speaking, if the glasses used in the dispensation of alcoholic beverages are measures, they might fall under the requirements of this section and be required to be marked specifically as to their capacity. But the question raised by your inquiry involves the duty and power to require standardization, which means that all containers used in dispensing alcoholic drinks shall be uniform. This is a different question and it is here not necessary to pass on the power to require marked containers.

In view of the fact that there is no expressed power in any act of the legislature to demand standardization of containers, and the fact that the sale of alcoholic beverages has always been regulated by legislation, we have concluded that the Act of July 24, 1913, P. L. 965, 76 P. S. § 244, is not applicable to such transactions.

Therefore, it is our opinion and you are accordingly advised that there is no duty imposed by law upon the Department of Internal Affairs to insist on standardization of glasses for the dispensation of alcoholic beverages.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ROBERT E. SCRAGG,  
*Deputy Attorney General.*

## OPINION No. 399

*Physicians and surgeons—Student interns—Right to serve between examination for licensure and notification of results—Medical Practice Act of June 3, 1911, as amended.*

A student intern may, under sections 5 and 7 of the Medical Practice Act of June 3, 1911, P. L. 639, as last amended by the Act of July 19, 1935, P. L. 1329, continue to serve as such from the time he takes his examination for licensure until time he is notified of the results of his examination.

Harrisburg, Pa., July 8, 1941.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you concerning a series of questions relating to medical interns. In this opinion we shall confine ourselves solely to the consideration of one question, and all other questions contained in your request will be the subject of a separate and later opinion.

The question which shall be the basis of this opinion is: May an intern continue to serve in the same capacity in the hospital where he serves his internship during that period which runs from the time that he takes his examination for licensure until he receives notice of the results of his examination.

The provisions of the law applicable to the problem are in sections 5 and 7 of the Medical Practice Act of June 3, 1911, P. L. 639, as last amended by the Act of July 19, 1935, P. L. 1329, 63 P. S. §§ 405, 409. Section 5 reads.

Applicants for licensure under the provisions of this act shall furnish, prior to any examination by the said board, satisfactory proof that he or she \* \* \* *shall have completed not less than one year as intern in an approved hospital* \* \* \*. (Italics ours.)

The 1935 amendment to this particular section added the following new paragraph:

This act shall also be construed as applying to hospitals employing, on salary, graduate interns whose services are confined to the said institutions, when they assume individual responsibility in the care of patients.

Section 7, *supra*, provides:

All persons who have complied with the requirements of the rules and regulations of the board, and who shall have passed a final examination, and who have otherwise complied with the provisions of this act, shall receive from the Department of Public Instruction, acting for the said board,

a licensing certificate entitling them to the right to practice medicine and surgery, \* \* \* Provided, That this section, relating to certificates to practice medicine and surgery, shall not apply to \* \* \* or any one while actually serving as a student intern under the supervision of the medical or surgical staff of any legally incorporated hospital or State hospital: \* \* \*.

In the order in which these provisions have been stated they provide:

(a) That before a graduate of an approved medical college can be examined for licensure he shall have completed not less than one year as an intern in an approved hospital, meaning a hospital approved by the board for the training of interns. This is a minimum, not a maximum requirement. An intern may serve more than one year in a hospital; there is no prohibition against such service in a hospital.

(b) That the Medical Practice Act applies to hospitals employing, on salary, graduate interns where they assume responsibility over the care of patients. This means that such interns, not being exempted from licensure, are subject to the requirements of the act. This construction conforms to that made by the Department of Welfare in its letter of May 16, 1936, in which it is said that hospitals employing graduate interns, on salary, whose services are confined to such institutions, and who assume individual responsibility in the care of patients, shall be licensed to practice medicine in Pennsylvania. The governing provision here is the assumption of responsibility over the care of patients. The term "graduate intern" and the employment on salary are immaterial. No person assuming responsibility is exempted from licensure.

(c) That student interns serving in any incorporated hospital or State hospital are exempt from the provisions of the Medical Practice Act requiring licensure so long as they act under the supervision of the medical or surgical staff of the hospital. This provision is not restricted to interns serving in hospitals approved for intern training, but applies to all interns in legally incorporated or State hospitals.

We have been informed that the State Board of Medical Education and Licensure refers to the year of service by an intern in an approved hospital as the "fifth year of medicine". Apparently this phrase has been coined as it is not contained in the Medical Practice Act. According to the board, a medical graduate who has completed his fifth year of medicine is a graduate intern. The board evidently has construed the term "student intern" as meaning a medical graduate who is serving his required one year as an intern in an approved hospital, that is, his fifth year of medicine.

Section 5 of the Medical Practice Act as amended, *supra*, which prescribes one year as an intern in an approved hospital, only prescribes the minimum. Section 7 of the same act, as amended, which exempts "student interns" from licensure while acting under proper supervision, exempts from licensure student interns serving in any incorporated or State hospital so long as the intern acts under the supervision of the medical or surgical staff of the hospital.

It is not apparent to us from a careful study of sections 5 and 7 of the Medical Practice Act how the State Board of Medical Education and Licensure can legally declare that a student intern must remain inactive as to any hospital service which he can render in his capacity as student intern from the time he takes his examination for licensure until he receives his license as a medical practitioner.

A student intern is one who is engaged in medical studies in a hospital; he is continuing his studies in the field of the practice of medicine under supervision, not of the college professor, but of the practitioner. This is the period of study during which he learns how to apply that which he has learned in a medical school.

We are unable to understand by what incantation of the board it is possible for it to say that because a student intern has taken the examination for licensure he suddenly disqualifies himself from further rendering the same service in which he has been engaged during his fifth year of medical study. We can conceive of no reason or any legal cause which suddenly makes a student intern, after he has taken his examination for licensure, a medical outcast during the waiting period. The fact is that under the Medical Practice Act a medical graduate may serve as a student intern so long as he acts under the required supervision. In so acting he violates no part of the Medical Practice Act as he is not practicing medicine or surgery without a license contrary to the act.

In the construing of a law, the courts, in order to ascertain and effectuate the legislative intent, are required to consider, *inter alia*, the mischief sought to be remedied and the object sought to be obtained. See Statutory Construction Act of May 28, 1937, P. L. 1019, section 51, 46 P. S. § 551.

What was the mischief to be remedied and the object to be obtained by the amendments to sections 5 and 7, *supra*, of the Pennsylvania Medical Practice Act? Obviously the answer is the prevention of the practice of medicine and surgery by interns in hospitals, prior to licensure, unless that practice is done under the supervision of the medical or surgical staff of the hospitals; and to accomplish this section 7 was amended so as to permit a student intern to practice, but

only under such supervision. Section 5 was also amended so as to require licensure if the intern assumed responsibility over the care of patients.

Prior to 1921 there was in section 5 of the Pennsylvania Medical Practice Act, the following clause:

\* \* \* Nothing in this act, however, shall be construed as applying to hospitals employing, on salary, graduate interns whose service is confined exclusively to the said institution. \* \* \*

This clause permitted interns in hospitals to practice medicine and surgery without being licensed and to assume responsibility. This provision was eliminated by an amendment on April 20, 1921, P. L. 158, and exemption from licensure thereafter depended upon the provision in section 7, as follows:

\* \* \* Provided, This section, relating to certificates to practice medicine and surgery, shall not apply to \* \* \* any one while actually serving as a member of the resident medical or surgical staff of any legally incorporated or state hospital: \* \* \*.

This latter provision was the one which from 1921 to 1935 exempted interns from licensure, since they could assume responsibility without licensure. There was no prohibition against it. They were, during this period, members of the resident medical and surgical staff of a hospital. However, this whole situation was changed in 1935 when the exemption was limited to student interns who serve under supervision.

There can be no clearer application of the legal rule of "where reason fails, the law fails" than when applied to the ruling of the State Board of Medical Education and Licensure which suddenly disqualifies a student intern from any further service in such a capacity merely because he has taken his examination for licensure. A careful study of the provisions of the Pennsylvania Medical Practice Act leads us to the inevitable conclusion that there is no real reason nor any legal justification for such an order on the part of the board. Certainly the continuance of the board's rule cannot but result in seriously handicapping the hospital service in this State which, in view of the existing national emergency, may become more acute with the passing of time if the hospitals are unable to secure their quota of student interns and resident physicians.

In view of the foregoing, it is our opinion that a student intern may continue to serve as such from the time he takes his examination

for licensure until such time as he is notified of the results of his examination.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

GEORGE J. BARCO,  
*Deputy Attorney General.*

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OPINION No. 400

*Mines and mining—Motormen—Right to have apprentices—Act of April 29, 1937.*

1. Since a motorman working in a mine is classified as a miner under section 1 of the Act of April 29, 1937, P. L. 551, he is, under that section, entitled to have a person working with him as an apprentice; the apprentice need not at all times be in sight of the motorman, but all his work must be done under the motorman's supervision.

2. A motorman's assistant, sometimes called a "snapper" or "brakeman," may be considered an apprentice under the Act of April 29, 1937, P. L. 551.

Harrisburg, Pa., July 10, 1941.

Honorable Richard Maize, Secretary of Mines, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to whether a motorman's assistant, sometimes called a "snapper" or "brakeman", could be considered as an apprentice under the Act of April 29, 1937, P. L. 551, as amended by the Act of June 24, 1939, P. L. 867. The amendment of 1939, *supra*, has no application to the question involved and for the purposes of this discussion may be ignored.

Section 1 of the Act of April 29, 1937, P. L. 551, 52 P. S. § 1401, provided as follows:

From and after the first day of April, one thousand nine hundred and thirty-eight, no person shall be employed or engaged as a miner in any bituminous coal mine in this Commonwealth, except as hereinafter provided for, without first having obtained a certificate of competency and qualification from a miners' examining board appointed under this act: Provided, however, That any miner holding such certificate may have one person working with him and under his direction as an apprentice for the purpose of learning the business of mining. For the purposes of this act, the term "miner" shall mean all underground workers in bituminous coal mines, except as hereinafter provided.

Paragraph 2 of section 5 of the Act of April 29, 1937, P. L. 551, 52 P. S. § 1405, provides as follows:

All persons possessing certificates of qualification issued by the Commonwealth of Pennsylvania entitling them to act as mine foreman, assistant mine foreman or fire boss shall be eligible to engage at any time as miners in bituminous mines of this State. Supervisory and technically trained employes of the operator, whose work contributes only indirectly to mine operations, shall not be required to possess a miner's certificate.

Section 6 of the Act of April 29, 1937, P. L. 551, 52 P. S. § 1406, provides as follows:

No person shall, after the first day of April, one thousand nine hundred and thirty-eight, engage as a miner, other than as an apprentice, in any bituminous coal mine in this Commonwealth without first having obtained a certificate of competency and qualification as provided for in this act, except as hereinbefore stated; nor shall any person, firm or corporation, or his or its agent, employ as a miner, other than as an apprentice, any person who does not hold such certificate, except as aforesaid. Any person, firm or corporation violating any of the provisions of this act, shall, upon conviction in a summary proceeding, be sentenced to pay a fine of not less than twenty-five dollars and costs nor more than one hundred dollars and costs, and, in default of the payment of such fine and costs, be imprisoned in the county jail for a period of ten days.

Section 1 of the act of 1937, *supra*, designates that the term "miner" shall mean all underground workers in bituminous coal mines with certain exceptions set forth in section 5 of the act as follows:

\* \* \* mine foreman, assistant mine foreman or fire boss  
\* \* \* . Supervisory and technically trained employes \* \* \* .

However, in this opinion we are not concerned with said exceptions. Inasmuch as an underground motorman is not within the excepted class, he must be classified as a "miner".

The same section provides that *any* miner holding such certificate may have one person working with him and under his direction as an apprentice for the purpose of learning the business of mining. Since a motorman is classed as a miner, he is entitled to have a person working with him as an apprentice, there being no distinction drawn by the legislature between the apprentice of a miner removing coal from a pillar, or other working place, and a miner operating a motor.

A motorman's assistant working as an apprentice may not be in sight of the motorman at all times, but the act of the legislature does not so require; it merely requires that the work of an apprentice be done under the direction of the miner. To work under the direction of another does not require one to be in the sight of the other at all times. If such were the case, an apprentice would not be able to leave his chamber, or other working place, for a prop without being accompanied by the miner; furthermore, if the legislature intended that an apprentice should at all times be within the sight of the miner it could have so provided in the statute.

We are therefore of the opinion that a motorman's assistant, who, in fact, is working with, and entirely and solely under the direction and control of a miner holding a certificate of competency and qualification may be an apprentice within the provisions of the Act of April 29, 1937, P. L. 551, 52 P. S. § 1401, et seq.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

E. A. DeLANEY,  
*Deputy Attorney General.*

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OPINION No. 401

*State institutions—Mental cases—Indigent persons—Care and support—Transfer—Supplies—Farms and buildings—Livestock—Rights of counties, cities and districts—Legislative intent—Act of September 29, 1938, P. L. 53, as amended.*

Under the act as amended by the Act of May 25, 1939, P. L. 193, when the Commonwealth takes over the control of institutions operated for the benefit of mental patients, as well as indigent persons, the stock of supplies are not transferred to the Commonwealth, but remains the property of the county, city or institution district. Farm buildings and implements are transferred to the Commonwealth. Livestock is also transferred, to the extent it is necessary to the operation of the institution, but the surplus remains vested in the county, city or institution district. Supplies incident to the maintenance of the patients are not the type of personal property to which the legislature made reference. If farm buildings are transferred, then likewise are farm implements, under section 1 of the act which transfers to the Commonwealth "the personal property within such buildings or incidental thereto." Livestock becomes the property of the Commonwealth, except that where more livestock was being maintained than is necessary to meet the basic food ration set out for their operation the surplus cannot be considered as having been transferred to the Commonwealth by the terms of the act.

Harrisburg, Pa., November 19, 1941.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: The Department of Justice has received your request for an opinion interpreting certain provisions of the Act of September 29, 1938, P. L. 53, 50 P. S. § 1051 et seq., relating to institutions of counties, cities and institution districts, for the care, maintenance and treatment of mental patients; providing for the transfer of such institutions to the Commonwealth; providing for the management and operation or closing and abandonment thereof, and the maintenance of mental patients therein.

You state that in order that the transition from local to State operation of the mental institutions involved may be effected both in compliance with the law and with the least possible practical difficulties, you desire to be advised concerning the application of the act to supplies inventories, farm buildings and implements and livestock.

In explanation of your request, you have submitted the following statement of facts and inquiries:

In relation to stores inventories, representatives of cities and counties having administered institutions, have questioned the right of the Commonwealth to take possession of supplies purchased by them prior to June 1, 1941 and on hand at that date. The Department of Welfare has taken the stand that safe administration of an institution as to the care and treatment of patients demands what might be termed a normal inventory of materials in stores. No detail has been developed as to what should constitute a safe or normal inventory. It is not deemed necessary to arrive at such a decision, nor would it be effective because the existing inventories vary greatly. The question on which an opinion is desired might be stated as:

Is the Commonwealth permitted to take over all or a proportionate share of the inventory on hand as of the effective date of this act as constituting an integral part of the facilities for care, maintenance and treatment of mental patients?

As to farm livestock and equipment, a similar question has arisen. It is contended by the representatives of certain counties and of the City of Pittsburgh that the farm livestock and implements are personal property acquired very much as items in general stores, and that the Commonwealth is not permitted by the above act to assume possession of the entire livestock census or all of the farm implements on hand as of June 1, 1941.

The Department of Welfare contends that the intent of the act is that the farm should be considered as one of the essential facilities of a mental hospital and that the farm buildings, implements and livestock are essential to the maintenance of the several farm activities. In several cases, it is conceded that more animal units are being maintained than are necessary to meet the basic food ration set up for mental institutions. There are, therefore, two questions on which opinions are sought.

(a) Are farm activities, including farm buildings, farm implements and livestock, to be considered as central functions or facilities similar to the laundry, sewage disposal, boiler and power plant, and the like, and therefore to be assumed by the Commonwealth?

(b) In cases where more animal units are obviously maintained than would be considered necessary in mental hospitals already under the supervision of the Department of Welfare, would the Commonwealth be permitted to release to the local unit previously administering the institution, the obvious surplus?

Your inquiries resolve themselves into a request for advice upon three questions:

1. Does the stock of supplies at certain institutions operated for mental patients in conjunction with indigent persons become the property of the Commonwealth or remain the property of the county, city or institution district, or is it divisible between them?

Similar questions apply to:

2. Farm buildings and implements; and
3. Livestock.

Your request for advice requires an interpretation of the Act of September 29, 1938, P. L. 53, 50 P. S. § 1051, et seq., as amended by the Act of May 25, 1939, P. L. 193, 50 P. S. § 1053.

The title of said act is as follows:

#### AN ACT

Relating to institutions of counties, cities and institution districts for the care, maintenance and treatment of mental patients; providing for the transfer of such institutions to the Commonwealth; providing for the management and operation or closing and abandonment thereof, and the maintenance of mental patients therein, including the collection of maintenance in certain cases; providing for the retransfer of certain property to institution districts under certain circumstances; conferring and imposing upon the Governor, the Department of Welfare, the courts of common pleas and counties, cities and institution districts certain powers and duties; prohibit-

ing cities, counties and institution districts from maintaining and operating institutions, in whole or in part, for the care and treatment of mental patients; and repealing inconsistent laws.

The first paragraph of section 1 of the act, providing for the transfer to the Commonwealth of buildings acquired or erected for mental patients, together with personal property, and lands in connection therewith is, in part, as follows:

\* \* \* All buildings acquired or erected by any county, city or institution district for the care, maintenance and treatment of mental patients, the personal property within such buildings or incidental thereto, and any and all other grounds and lands connected therewith or annexed thereto, are hereby transferred to and vested in the Commonwealth of Pennsylvania, \* \* \*

This section excepts buildings and lands used for indigent persons, as follows:

\* \* \* except that where any such buildings for mental patients are operated in conjunction with buildings dedicated to the care and maintenance of indigent persons who are not mental patients, the buildings used for the care of such persons, the land actually occupied by such buildings, the lands or yards presently set apart for the use of the indigent persons cared for in such buildings, and the lands necessary for ingress and egress thereto and therefrom, shall not be deemed to be hereby transferred, but shall remain vested in the county, city or institution district as theretofore.

Paragraph 2 of section 1 of the act relating to the division of the farm and woodlands between the Commonwealth and the institution district on the basis of the ratio of indigent persons to the total patient population of the institution, provides, *inter alia*, as follows:

Where any lands and property so transferred are presently used by any institution district as a farm and woodlands in connection with buildings dedicated to the care and maintenance of indigent persons who are not mental patients, the Department of Welfare of the Commonwealth, with the approval of the Governor, shall set apart and reconvey to the institution district, through deed executed by the Secretary of Property and Supplies of the Commonwealth, so much of such ground as the ratio of indigent persons bears to the total patient population of the institution, as shall be determined by the Department of Welfare of the Commonwealth. \* \* \*

The third paragraph of section 1, concerning auxiliary structures and facilities furnishing light, heat, power, water, laundry, kitchen, sewage treatment services and coal supply, transferred to the Commonwealth, is as follows:

Where auxiliary structures and facilities furnishing light, heat, power, water, laundry, kitchen, sewage treatment services and coal supply \* \* \* transferred to the Commonwealth which were theretofore used in common for the buildings devoted to mental patients and also the buildings devoted to indigent persons, the Commonwealth shall thereafter continue to furnish the proper institution district with such services, at the actual cost thereof, to the extent the same may hereafter be requested by the institution district.

The act has been held constitutional in the case of *Chester County Institution District et al. v. Commonwealth et al.*, 341 Pa. 49 (1941).

It will be necessary to bear in mind the foregoing general provisions of the act in order to carry out all its provisions, as required by the Statutory Construction Act of May 28, 1937, P. L. 1019, Section 51; 46 P. S. § 551, which provides, *inter alia*:

\* \* \* Every law shall be construed, if possible, to give effect to all its provisions.

Your request for advice presents situations not covered by the express language of the act, and as stated in the opinion of the Supreme Court in the Chester County case, *supra*, at page 58:

\* \* \* The problem was not simple in its elements. \* \* \*

The Supreme Court further stated, at page 59:

\* \* \* As the Commonwealth was not taking over the operation of all these institutions but only the mental health hospitals, it became necessary to provide for the application of the law as the facts might require. No complaint therefore can be sustained merely because of difficulty in separating the property used for the poor from that used in the mental health cases. \* \* \*

#### SUPPLIES

You inform us that as of May 31, 1941, certain supplies were on hand in the institutions which had been purchased by the county or city or institution district, as the case may have been, for the maintenance and treatment of mental patients. Such supplies would range from groceries and cleaning materials on the one hand to such items as drugs and medicines on the other. In one such institution the itemization included groceries, vegetables, fruit, dairy products, meat, tobacco, bedding, clothing, household supplies, paints, hardware, plumbing, electrical supplies, drugs, and hydrotherapy supplies. The first question involved may be briefly stated as follows:

Are such supplies to go to the Commonwealth or to remain with the city or county or institution district which previously operated the hospital?

In our opinion the acts quoted above did not contemplate the taking over by the Commonwealth of such supplies. The only basis upon which a different view could be taken is the fact that in section 1 of the act, *supra*, the transfer is to include "the personal property within such buildings or incidental thereto." It is to be noted, however, that the emphasis in all the quotations above cited is upon the transfer of land and buildings, and it is our conclusion that the reference to personal property requoted above expresses the intention of the legislature to ordain that such personal property as may be necessary to the buildings or to the land shall pass to the Commonwealth. It is well known that in the law dispute frequently arises as to whether or not an item of personal property is attached or fixed to the real estate so as to make it a part of the realty. It is also well recognized that certain articles which would in themselves be considered purely personal property, nevertheless become a necessary feature in the maintenance or operation of a building. Water tanks, gasoline tanks, certain kinds of machinery generally kept in out-buildings, and other such items, would be plentiful in and about a mental institution, and dispute could readily arise as to whether or not some such items were affixed to land or a part of a building. If the act contained no language indicating that this type of property were to be transferred, the county or the city might seek to take this particular type of personal property. As we view the situation, the inclusion of the language concerning personal property was merely to meet this situation.

The absurdity of adopting any other view can be shown by some consideration of the clause, "the personal property within such buildings." If we were to adopt the view that all the personal property that happened to be within a building was transferred, we might find ourselves in a situation where a truckload of coal which had been placed in the cellar, would become the property of the Commonwealth but a truckload of coal which had been perhaps dumped on the ground somewhere within the hospital premises would not become the property of the Commonwealth.

In our opinion, the proper way to view the situation is to conceive of coal as being something not "incidental to a building," and also that the final decision as to who would own the coal should rest upon some stronger basis than the locale of its unloading.

Supplies have been defined by Webster as "the quantity, especially of a commodity, at hand or needed." Another definition of the same authority is, "provisions, clothing, arms, raw materials, etc., set aside to be dispensed at need; stores."

These definitions suggest goods which are being consumed from day to day or in a relatively short period of time. It is to be noted

that the above listing is comprised almost entirely of such items which are easily or quickly consumed. It is true that certain types of bedding might enjoy a comparatively long life, but for the most part the items mentioned hereinbefore are used or consumed quickly. Coal, to which we have made reference above, would also belong to this class which is known generally as consumable goods.

If the legislature in paragraph one of the act, quoted above, intended that the title to such goods be transferred to the Commonwealth, there would be no need for use of the language, also quoted above, "personal property within such buildings or incidental thereto." Any operating institution would, of course, have on hand such supplies, and their relation to land or buildings would not be in any sense of the word, vital, or for that matter, a close relationship. Such supplies are goods which are incidental to the maintenance of the patients and are not, in our opinion, the type of personal property to which the legislature made reference.

In answer to your first inquiry we would, therefore, say that there is no intention on the part of the legislature that what we have termed and differentiated as "supplies" be transferred to the Commonwealth. They should remain with the previous owner of the hospital, be it a city, county, or institution district.

#### FARM BUILDINGS AND FARM IMPLEMENTS

2. Are farm buildings and farm implements transferred to the Commonwealth by the terms of the act, or do they remain vested in the county, city or institution district as theretofore?

Within the meaning of farm buildings are included the barns, silos, implement sheds, henneries, pighouses, greenhouses, stables and other buildings in use in conjunction with the farms, farm lands and woodlands of the various institutions.

Section 1 of the act, *supra*, transfers to the Commonwealth *all* buildings acquired or erected for the maintenance of mental patients, together with the personal property within such buildings or incidental thereto, except that buildings dedicated to the maintenance of indigent persons, who are not mental patients, are not so transferred, but remain vested in the county, city or institution district.

The Supreme Court stated in the Chester County case, *supra*, at page 59:

\* \* \* The Legislature, having declared that all the property devoted to care of mental health cases should be taken, and that the Commonwealth should thereafter perform the service, might have retained all the property devoted to that purpose

and there is nothing in the Act which prevents the Commonwealth from retaining all of it. It was unnecessary in this Act to provide to return any part of it.

Does this language mean that buildings, personal property, and lands, which are used for mental patients, are transferred to the Commonwealth regardless of the fact that such buildings, personal property, and lands are also being used for indigent persons?

We are not prepared to go this far; neither is it necessary to do so for the purposes of this opinion.

Surely, the farm buildings are part of the mental hospital property, and just as essential to its management and operation as other buildings belonging to, and constituting part of, the mental hospital.

The Supreme Court, in the Chester County case, *supra*, at page 58, said:

\* \* \* it is well to have clearly in mind what was enacted. The legislature took from the institution districts throughout the state, created by the Act of 1937, *supra*, the power to operate hospitals for indigent mentally ill persons and declared the Commonwealth would thereafter perform that service, and, in order to perform it, took from the institution districts existing hospital properties. \* \* \*

In order to perform the service of operating mental hospitals, the legislature must have taken the farm buildings from the institution districts when transferring existing hospital properties.

The intent of the legislature to take from the institution districts buildings which were not used solely for mental patients is indicated in the third paragraph of section 1 of the act, *supra*, which provides that where auxiliary structures and facilities furnishing light, heat, power, water, laundry, kitchen, sewage treatment services and coal supply are so transferred to the Commonwealth which were theretofore used in common for the buildings devoted to mental patients and also the buildings devoted to indigent persons, the Commonwealth shall thereafter continue to furnish the proper institution district with such services, at the actual cost thereof.

While there is no express provision in this paragraph relating especially to farm buildings and farm implements, they may be considered analogous to the auxiliary structures and facilities furnishing the services set forth.

Further, the farm buildings and farm implements are more closely related to the operation of the mental hospitals than the indigent homes, for the reason, as we are informed, that the indigent persons in the

homes who are able to work the farms maintained in conjunction with the institution district homes and hospitals, are comparatively few in number.

If the farm buildings are transferred by the act to the Commonwealth, then likewise are the farm implements also transferred under the provisions of the first paragraph of section 1 of the act which transfers to the Commonwealth "the personal property within such buildings or incidental thereto."

In any event, it must be concluded that the farm buildings and farm implements are essential to the operation of the mental hospitals and must, therefore, be considered as having been transferred by the act to the Commonwealth.

### LIVESTOCK

3. Is the livestock, maintained at the institutions, transferred to the Commonwealth by the terms of the act, or does it remain vested in the county, city or institution district as theretofore?

What is hereinbefore stated with regard to the validity of the transfer to the Commonwealth of the farm buildings and farm implements, applies with similar force and effect to the acquisition by the Commonwealth of the chickens, turkeys, pigs, sheep, horses, mules, cattle, and other farm animals maintained at the institutions of the county, city and institution district.

It has been suggested that such livestock belongs wholly, or in part, to the institution districts as personal property incidental to the homes for the indigent.

Finding, as we have hereinbefore found, that the farm buildings and farm implements were transferred to the Commonwealth by the act, it would be inconsistent here to find that, under the second paragraph of section 1 of the act, the ownership of the livestock remains vested in the institution districts, without the buildings within which to house such livestock, the buildings to which such livestock is "incidental thereto," in the terms of the act.

It is no more unreasonable to hold that farm buildings, farm implements, and livestock are transferred to the Commonwealth by the act, than are the express provisions of the third paragraph of section 1 of the act which transfer auxiliary structures and facilities furnishing light, heat, power, water, laundry, kitchen, sewage treatment services and coal supply.

If it be lawful for the Commonwealth to take the auxiliary structures and facilities enumerated in the act, it must be equally lawful to take the other kind of property, consisting of farm buildings, farm implements, and livestock, the latter probably being just as essential to the operation of the mental hospitals as the former.

While it is true that the act deprives the institution districts of certain property, nevertheless, the institution districts are also relieved of the burden of caring for its mental patients.

The Supreme Court, in the Chester County case, *supra*, at page 64, held:

The taxpayers joining in the bill show no ground for equitable relief; there is not even an averment that their taxes will be increased; if the state takes over the operation and pays the bills the taxpayer plaintiffs will probably pay less, for the purpose, than they paid before. So far as the averment of irreparable damage is concerned, it is sufficient to say that the legislature had the power to pass the Act; presumably, the legislature gave adequate consideration to the effect on the taxpayers of the county; we find nothing authorizing the Court to say that the legislature exceeded its power on the ground suggested.

The court further held, at page 57:

\* \* \* Within constitutional limitations not involved in the case, the Commonwealth has absolute control over such agencies and may add to or subtract from the duties to be performed by them, or may abolish them and take the property with which the duties were performed without compensating the agency therefor: \* \* \*.

The first paragraph of section 1 of the act, which transfers to the Commonwealth all buildings used for the care of mental patients, together with the personal property within such buildings, or incidental thereto, and all other grounds and lands connected therewith, further provides that buildings dedicated to indigent persons who are not mental patients, are not transferred, but remain vested in the county, city or institution district as theretofore.

However, it will be observed that there is no express provision in said paragraph authorizing personal property used for indigent persons to remain so vested.

Neither does the second paragraph of section 1 of the act provide for the reconveyance to the institution district of personal property, but only, "so much of such ground," used by the institution district as a farm and woodlands.

In discussing the difficulty of separating the property used for indigent persons from that used for mental patients, the Court, in the Chester County case, *supra*, at page 59, held:

\* \* \* As the Commonwealth was not taking over the operation of all these institutions but only the mental health hospitals, it became necessary to provide for the application of the law as the facts might require. No complaint therefore can be sustained merely because of difficulty in separating the property used for the poor from that used in the mental health cases. If the Commonwealth may take all, it may take part. \* \* \* The legislature, having declared that all the property devoted to care of mental health cases should be taken, and that the Commonwealth should thereafter perform the service, might have retained all the property devoted to that purpose and there is nothing in the Act which prevents the Commonwealth from retaining all of it. It was unnecessary in this Act to provide to return any part of it.

Accordingly, we believe that livestock, maintained at the institutions, becomes the property of the Commonwealth, under the act, except that where more livestock was being maintained than is obviously necessary to meet the basic food ration set up for the operation of the mental hospital, the surplus thereof cannot be considered as having been transferred to the Commonwealth by the terms of the act.

From this conclusion, it follows that the surplus livestock, not deemed to be transferred to the Commonwealth, remains vested in the county, city or institution district, as theretofore and thereby also, the Commonwealth is relieved of the necessity either of disposing of such surplus livestock or of maintaining more livestock than is required for the operation of the mental institution.

We are of the opinion that under the Act of September 29, 1938, P. L. 53, 50 P. S. § 1051 et seq., as amended by the Act of May 25, 1939, P. L. 193, 50 P. S. § 1053, relating to the transfer of certain mental institutions to the Commonwealth:

1. The stock of supplies at certain institutions operated for mental patients in conjunction with indigent persons, was not transferred to the Commonwealth, but remains the property of the county, city or institution district; and

2. Farm buildings and farm implements at such institutions were transferred to the Commonwealth; and

3. Livestock maintained at such institutions was also transferred to the Commonwealth, to the extent of the amount of such livestock necessary to the operation of the mental hospital, and the surplus thereof remains vested in the county, city or institution district.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

H. J. WOODWARD,  
*Deputy Attorney General.*

## OPINION No. 402

*Insurance—Title insurance companies—Power to issue building completion bonds—Insurance Company Law of 1921, sec. 686, 695, and 201(c)1, as amended—Banking institutions doing title insurance business—Banking Code of 1933, sec. 1102, as amended—Casualty insurance companies.*

Sections 686 and 695 of The Insurance Company Law of May 17, 1921, P. L. 682, as amended, empowering title insurance companies to insure owners and others interested in real estate from loss by reason of defective titles, liens or encumbrances, and section 1102 of the Banking Code of May 15, 1933, P. L. 624, conferring similar powers upon banking institutions doing a title insurance business, do not empower such companies to issue performance bonds obligating them to complete or pay for the completion of buildings where contractors have failed to perform their undertakings, since the fact a building is or is not completed does not affect the title one way or another; especially is this so in view of the fact that casualty insurance companies incorporated inter alia for the purpose of guaranteeing the performance of contracts as provided by section 202(c)1 of the Insurance Company Law, as amended, are authorized to issue such bonds.

Harrisburg, Pa., November 19, 1941.

Honorable John C. Bell, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: For some time there has been discussion between your department and this department as to the right of a title insurance company to issue what are known as "completion bonds." Under recent date you have requested that we issue an opinion.

Some of the banking institutions under your jurisdiction which exercise the powers of a title insurance company have adopted the practice of issuing a bond to the owner of land who has contracted for the construction of improvements thereon, the obligation being to complete or to pay for the completion of a building in case the contractor fails to perform his undertaking entirely. The situation which this practice seeks to protect is that in recent years contractors have frequently become insolvent or bankrupt at the time a building is only partially completed, and the owner of the land is left with an incomplete structure upon his hands.

We feel that this undertaking in no way fulfills the purpose of a title insurance company. Section 695 of the Insurance Company Law of 1921, being the Act of May 17, 1921, P. L. 682, as added by the Act of July 1, 1937, P. L. 2540, 40 U. S. § 895, provides as follows:

Title insurance companies shall have the power to make insurance of every kind pertaining to or connected with *titles to real estate*; and to make, execute, and perfect such and so many contracts, agreements, policies, and other instruments as may be required therefor; such insurances to be made for

the benefit of owners of real estate, mortgagees, and others interested in real estate, *from loss by reason of defective titles, liens, and encumbrances.* (Italics ours.)

Section 686 of the same act, 40 P. S. § 896, provides as follows:

Every corporation which upon the effective date of this act shall lawfully possess, and which has within one year prior to such date exercised, the power to insure owners of real property, mortgagees, and others interested in real property, and others *from loss by reason of defective titles, liens and encumbrances,* shall, subject to the conditions herein prescribed, continue to possess such power. (Italics ours.)

While the law above quoted is from the Insurance Company Law, the powers of a banking institution doing a title insurance business are expressed in practically similar language in Section 1102 of The Banking Code, being the Act of May 15, 1933, P. L. 624, 7 P. S. § 819-1102, which provides as follows:

In addition to the general corporate powers granted by this act, and in addition to any powers specifically granted to a bank and trust company or a trust company elsewhere in this act, a bank and trust company or a trust company shall have the following powers, subject to the limitations and restrictions imposed by this act:

\* \* \* \* \*

(5) In the case of certain existent bank and trust companies or trust companies, to insure owners, mortgagees, and others interested in real property *from loss by reason of defective titles, liens, and encumbrances.* 1933, May 15, P. L. 624, art. XI, § 1102; 1935, July 2, P. L. 521, § 1. (Italics ours.)

It is clear from the above that the purpose of a title insurance company is to insure the owner of real estate, or a mortgagee, or others interested in real estate, from loss by reason of defective titles, liens and encumbrances. The title to land improved by an incomplete building can be as free of defects, liens and encumbrances as can the title to real estate upon which a complete structure has been erected. In other words, the fact that the structure is or is not complete does not affect the title one way or another. It is true that a mechanic's lien arises out of the construction of a building but even there the situation is no different whether the building be complete or incomplete. A study of the above definitions clearly discloses that the purpose of title insurance companies is to prevent loss arising from title defects, liens or encumbrances, and not to insure against loss occasioned by the fact that a contractor has failed to complete his undertaking.

It also happens that certain casualty insurance companies are authorized to issue a bond which legally and adequately affords the holder thereof the full protection which a landowner needs in the circum-

stances. That is, a casualty insurance company may be incorporated, inter alia, for the following purpose (Section 202(c) (1) of the Insurance Company Law, *supra*, as amended by the Act of June 4, 1937, P. L. 1632, 40 P. S. § 382):

Guaranteeing the fidelity of persons holding places of public or private trust; *guaranteeing the performance of contracts, \* \* \** (Italics ours.)

The above clearly indicates to us that it is the intention of the legislature that a casualty insurance company and not a title insurance company should issue what are commonly termed performance bonds.

Of course, companies which function both as a bank and as a title insurance company are under your jurisdiction even though the title insurance feature is, as its name suggests, an insurance operation. In fact, your concern is that the assets of an institution which does this dual business are subject to great liability by reason of the issuance of insurance policies which provide for losses occasioned by the failure to complete buildings being erected upon land. It can readily be seen that such liability would exceed the total assets of the institution if at any one time such policies were issued in great number, or for very large amounts. Depositor's money is subjected to such liability because the institution operates as a unit and all its assets are subject to all its liabilities.

It is our opinion, therefore, that the present law does not contemplate title insurance companies issuing performance bonds or contracts, and the institutions under your supervision which conduct a title insurance business should be notified to discontinue such activity.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

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OPINION No. 403

*Dixmont Hospital—Mental cases—Support and maintenance—Real and personal property—Financial ability to pay—Liability—Indigent—Counties—Municipalities—Act of October 11, 1938, P. L. 63.*

The costs of the care and maintenance of a mental patient in any hospital maintained wholly or in part by the Commonwealth, must be defrayed from the real or personal property of such patient. Where the inmate of a State hospital

is financially unable to pay such expenses or any proportion thereof, then such expenses or the proportion thereof which cannot be collected from the patient, or the person liable for his support, shall be paid by the Commonwealth.

Harrisburg, Pa., November 21, 1941.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice concerning the liability for the costs of the care and maintenance of the indigent insane in Dixmont Hospital.

In explanation of your request, you state that:

The Dixmont Hospital maintains indigent mental patients from approximately twenty counties in the western part of Pennsylvania. Up until June 1, 1941, the cost of maintenance of these patients was borne by the counties or poor districts or municipalities which were liable for their support and by the Commonwealth in the proportion fixed by law. Since the amendments to the Mental Health Act of 1923 which became effective June 1, 1941, several counties have raised the question as to their continued liability for maintenance of patients committed to the Dixmont Hospital from their districts.

You further inform us that:

Since June 1st, several counties have flatly refused to pay the bills, which aggregate over \$31,000, for the care and maintenance of their insane persons at Dixmont Hospital; and that with these counties refusing to make any payments, the hospital is having a desperate time to meet its pay rolls.

We also understand that the Dixmont Hospital is a private State-aided hospital for mental persons, located at Dixmont in Allegheny County.

Specifically, you request an opinion as to whether or not the counties are relieved from liability for the costs of the care and maintenance of the indigent insane at Dixmont Hospital.

The Dixmont Hospital still retains the right to care for mental patients by virtue of the Mental Health Act of July 11, 1923, P. L. 998, Section 201, as amended by the Act of October 11, 1938, P. L. 63, Section 1, 50 P. S. § 21.

Your question concerning the liability for the maintenance of indigent insane in State hospitals for such patients, relates to the Act of April 25, 1929, P. L. 707, No. 305, Section 1, 50 P. S. § 624, as amended by the Act of June 1, 1931, P. L. 300, Section 1, as amended by the Act of May 23, 1933, P. L. 975, Section 1, 50 P. S. § 624.

The act of 1929, *supra*, as amended, provided, *inter alia*, as follows:

The part of the cost of the care and maintenance, including clothing, of the indigent insane, whether chronic or otherwise, in the State hospitals for the insane, payable by the counties or poor districts, is hereby fixed at the uniform rate of three dollars per week for each person, which shall be chargeable to the county or poor district from which such insane person shall have come, and the amount of the aforesaid cost, over and above three dollars per week chargeable to the counties or poor districts, shall be paid by the Commonwealth: \* \* \*

The foregoing section of the act of 1929, *supra*, and its amendments were repealed by section 2 of the Act of October 11, 1938, Special Sessions, P. L. 63, 50 P. S. § 21, which placed the liability for the costs of the care and treatment of such patients upon the Commonwealth.

The Act of 1938, P. L. 63, *supra*, amended the Mental Hospital Act of July 11, 1923, P. L. 998, and Section 503 thereof, 50 P. S. § 143, was amended to read as follows:

Whenever any mental patient is admitted, \* \* \* to any mental hospital maintained wholly or in part by the Commonwealth, the cost of care and maintenance, including clothing, of such patient \* \* \* if he is financially unable to pay such expenses or any proportion thereof, then such expenses or the proportion thereof which cannot be collected from the patient, or the person liable for his support, shall be paid by the Commonwealth.

This amendatory Act of 1938, P. L. 63, *supra*, became effective June 1, 1939, but the Act was subsequently amended by the Act of May 25, 1939, P. L. 195, 50 P. S. § 21, so as to become effective June 1, 1941.

We are of the opinion that the costs of the care and maintenance of a mental patient in any mental hospital maintained wholly or in part by the Commonwealth, must be defrayed from the real or personal property of such patient. If he is financially unable to pay such expenses or any proportion thereof, then such expenses or the proportion thereof which cannot be collected from the patient, or the person liable for his support, shall be paid by the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

H. J. WOODWARD,  
*Deputy Attorney General.*

## OPINION No. 404

*Workmen's compensation—Occupational disease compensation—Commonwealth's liability for interest on payments—Acts of June 4, 1937, July 2, 1937, June 21, 1939, and May 29, 1941.*

1. The rule that a sovereign is not included within the provisions of a statute unless specifically named applies to a statute which deprives the sovereign of a recognized or established prerogative, but is less stringently applied where the operation of the law is upon agents of the government rather than upon the sovereign himself.

2. Section 410 of The Workmen's Compensation Act of June 4, 1937, P. L. 1552, to which the Occupational Disease Compensation Act of July 2, 1937, P. L. 2714, is a supplement, and section 410 of the Pennsylvania Occupational Disease Act of June 21, 1939, P. L. 566, containing similar provisions respecting the payment of interest upon amounts of compensation due claimants, apply to the Commonwealth's pro rata share of compensation awards provided for by section 7(a) of the 1937 act and section 308(a) of the 1939 act, since both acts provide for joint liability of the Commonwealth and the employer, and especially since workmen's compensation acts are liberally construed in favor of claimants; therefore, Act 8A of May 29, 1941, appropriating funds for the Commonwealth's proportionate share of compensation payments, will be construed to include payments of interest and the Department of Labor and Industry is required to pay interest on the Commonwealth's share.

Harrisburg, Pa., November 21, 1941.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of October 7, 1941 requesting our advice as to whether your department shall pay interest on the Commonwealth's proportionate share of payments for occupational diseases.

At the outset it is necessary to call attention to the fact that the sovereign is not included within the provisions of a statute unless specifically named: See the early case of *Commonwealth v. Yeakel*, 1 Woodward 143 (1863) which was followed in the case of *Puloka v. Commonwealth*, 28 D. & C. 367 (1936). However, in the case of *Nardone v. United States*, 302 U. S. 379, 82 L. Ed. 314 (1937) this principle was considerably limited in a decision by Justice Roberts, to the provisions of a statute which deprive the sovereign of a recognized or established prerogative. The court further called attention to the fact that the principle is less stringently applied where the operation of the law is upon agents or servants of the government rather than upon the sovereign itself.

Referring then to the Pennsylvania statutes governing occupational diseases, we find that Section 410 of the Pennsylvania Occupational Disease Act of June 21, 1939, P. L. 566, 77 P. S. 1510, provides, inter

alia, that amounts of compensation shall bear interest at the rate of six percent as follows:

Whenever any claim for compensation is presented to the board, and is finally adjudicated in favor of the claimant, the amounts of compensation actually due at the time the first payment is made after such adjudication shall bear interest at the rate of six per centum per annum from the day such claim is presented, and such interest shall be payable to the same persons to whom the compensation is payable.

The Occupational Disease Compensation Act of July 2, 1937, P. L. 2714 was a supplement to the Workmen's Compensation Act of June 2, 1915, P. L. 736, as reenacted and amended by the Act of June 4, 1937. P. L. 1552, 77 P. S. § 1, et seq., and section 410 of the latter act makes practically the same provision regarding interest as the above quoted section 410 of the 1939 Pennsylvania Occupational Disease Act, supra, as follows:

Whenever any claim for compensation is presented to the board, other than claims of nonresident alien dependents, and is finally adjudicated in favor of the claimant, the amounts of compensation actually due at the time the first payment is made after such adjudication shall bear interest at the rate of six per centum, beginning fourteen days after the date of the accident, and such interest shall be payable to the same persons as the compensation is payable.

See also Section 3 of the Occupational Disease Compensation Act of July 2, 1937, P. L. 2714, supra, where the term "disability" is defined thus:

Disability as used herein means the state of being so disabled. The date when the disability occurs from occupational disease shall be deemed to be the date of injury or accident.

The question arises: Do the above provisions relative to interest apply to the Commonwealth's pro rata share of awards in occupational disease cases?

Section 308 (a) of the 1939 Pennsylvania Occupational Disease Act makes provision for the Commonwealth's share of awards in certain occupational disease cases as follows:

Section 308. (a) When compensation is awarded because of disability or death caused by silicosis, anthraco-silicosis, asbestosis, or any other occupational disease which developed to the point of disablement only after an exposure of five or more years, *the compensation for disability or death due to such disease shall be paid jointly by the employer and the Commonwealth* out of moneys to the credit of the Occupational Disease Fund hereinafter created in the State Workmen's Insurance Fund, in accordance with the following provisions: If disability begins between October 1, 1939, and

September 30, 1941, both dates inclusive, the employer shall be liable for and pay fifty per centum of the compensation due and the Occupational Disease Fund fifty per centum thereof. Thereafter, depending upon the date when disability begins, the proportions of compensation for which the employer and the Occupational Disease Fund shall respectively become liable shall be: If disability begins between October 1, 1941, and September 30, 1943, the employer sixty per centum and the Occupational Disease Fund forty per centum; if between October 1, 1943, and September 30, 1945, the employer seventy per centum and the Occupational Disease Fund thirty per centum; if between October 1, 1945, and September 30, 1947, the employer eighty per centum and the Occupational Disease Fund twenty per centum; if between October 1, 1947, and September 30, 1949, the employer ninety per centum and the Occupational Disease Fund ten per centum. The employer shall pay the full amount of compensation provided in this act for disability or death in all cases where disability begins on or after October 1, 1949. (*Italics ours.*)

Section 7 (a) of the 1937 Occupational Disease Compensation Act also provides as follows:

Section 7. (a) In the case of such occupational diseases as the Workmen's Compensation Board shall determine develops to the point of disablement only after an exposure of five or more years, *the compensation for disability or death due to such diseases shall*, for a period of ten years immediately succeeding the effective date of this act, *be payable jointly by the Commonwealth and the employer*, as follows: If disability occurs, or if no compensable period of disability occurs if death occurs, during the first year in which this act becomes effective, the employer shall be liable for and pay one-tenth of the compensation for such disability or death, and the remainder of such compensation shall be paid by the Commonwealth out of moneys to the credit of the Second Injury Reserve Account in the State Workmen's Insurance Fund. Thereafter for each successive year of such ten-year period in which disability occurs, or if no compensable period of disability occurs if death occurs, the employer shall be liable for and shall pay one-tenth more of such compensation, and the remainder of such compensation shall be paid by the Commonwealth out of moneys to the credit of the Second Injury Reserve Account in the State Workmen's Insurance Fund. After the expiration of such ten-year period, the employer shall pay the compensation for disability or death occurring thereafter in full. (*Italics ours.*)

Act No. 8-A, approved May 29, 1941 made an appropriation for the Commonwealth's proportionate share of occupational disease awards as follows:

The sum of one million dollars (\$1,000,000) or so much thereof as may be necessary is hereby appropriated out of the

General Fund to the Department of Labor and Industry for the payment of amounts payable from time to time during the two fiscal years beginning June first one thousand nine hundred forty-one *by the Commonwealth as its share of the compensation* payable to claimants for certain occupational diseases \* \* \*. (Italics ours.)

The question presented is whether "compensation" includes the award alone or award plus interest beginning fourteen days after the date of accident (disability) as provided in the 1937 Workmen's Compensation Act to which the 1937 Occupational Disease Act was a supplement, or from the day the claim is presented as provided in the 1939 Occupational Disease Act. Both the 1937 and 1939 occupational disease acts make express provision for interest, and, since the Commonwealth and the employer are jointly liable, if the employer is liable for interest, the Commonwealth has a like responsibility to the extent provided for in the above enactments of the legislature.

It should be noted that workmen's compensation acts are liberally construed by the courts in favor of claimants. In the case of *Staller v. Staller*, 144 Superior Ct. 83 (1941), recently affirmed by our Supreme Court, medical service was included under the term "compensation." In the later case of *Margaret M. Potzinger v. Earle Hardware Mfg. Co.*, filed September 15, 1941 (No. 30 March Term, 1941), the Common Pleas Court of Berks County ruled that funeral expenses were included within this term of "compensation."

It would, therefore, seem that the foregoing 1941 appropriation for payment of the Commonwealth's share of compensation payable to claimants for certain occupational diseases would, under the provisions of the Workmen's Compensation Act and occupational disease acts, above discussed, include payment of interest.

In view of the foregoing, we are of the opinion that your department shall pay interest on the Commonwealth's proportionate share of compensation payments for occupational disease as provided by law.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

## OPINION No. 405

*Unemployment compensation—Benefit—Award—Determination—Payments—Appeals—Construction of statutes—Act of May 28, 1937, P. L. 1019.*

Under the provisions of the Unemployment Act of December 5, 1936, P. L. 2897, as amended, and the Statutory Construction Act of May 28, 1937, P. L. 1019, the plain and mandatory provisions of section 501 of the Unemployment Compensation Law prevail over the provisions referred to in section 404.

The Department of Labor and Industry is not required to make quarterly redeterminations of the amount of a claimant's compensation. The amount of compensation determined at the beginning of a benefit year shall be final and prevail throughout the benefit year.

Harrisburg, Pa., November 24, 1941.

Honorable Clarence E. Blackburn, Honorable Stanley J. Davis, Members, Unemployment Compensation Board of Review, Department of Labor and Industry, Harrisburg, Pennsylvania.

Sirs: This department is in receipt of your recent communication requesting an opinion as to whether, under the provisions of the Unemployment Compensation Law, the Act of December 5, 1936, P. L. (1937) 2897, as amended May 18, 1937, P. L. 658 and June 20, 1939, P. L. 458, 43 P. S. § 751 et seq., the Department of Labor and Industry is required to make quarterly redeterminations of the amount of a benefit award allowed to a compensation claimant.

The provision of the Unemployment Compensation Law which gives rise to the question of quarterly redeterminations is contained in section 404 thereof and reads as follows:

Section 404. Amount of Compensation.—The maximum total amount of compensation payable to any eligible employe during any benefit year shall not exceed one-eighth of his total wages from employers during the first eight out of the last nine completed calendar quarters immediately preceding each week with respect to which compensation is payable \* \* \*, or thirteen times his weekly compensation amount, whichever is the lesser.

You will observe that under the language of the above-quoted provision the maximum total amount of compensation payable to any eligible employe during any benefit year is limited to one-eighth of the employe's total wages in covered employment during the first eight out of the last nine completed calendar quarters immediately preceding each week of the benefit year. You will further observe that the provision contains no qualification as to the calendar quarter of the benefit year in which "each week with respect to which compensation is payable" may occur. The language of the provision would, therefore, indicate that the amount of compensation payable to an eligible

employee during a benefit year is subject to a limitation, which limitation may vary with respect to different periods of the benefit year, depending upon the calendar quarter of the benefit year in which a particular weekly claim may be filed. From reading the foregoing provision alone, it would appear that the Department of Labor and Industry may be required by the law to determine the amount of a benefit award not only at the time the department makes the initial determination of compensation, but that it must also redetermine the amount of benefits and modify the award in each of the three calendar quarters of the benefit year, subsequent to the first calendar quarter, in which the claimant files continued weekly claims. Thus, the department would have to make an initial determination of the amount of compensation in the first calendar quarter in which a weekly benefit payment is made to the claimant, and when that calendar quarter expired the bureau would have to make a second determination of the amount of benefits allowable, and so on, with respect to the third calendar quarter and the fourth calendar quarter of the benefit year.

If, as indicated above, we were limited in our consideration of the question to the foregoing provisions in section 404 of the act, there might appear to be no alternative but to rule that quarterly redeterminations of compensation were required of the department. There are, however, other provisions of the law relating to the determination of compensation by the department which must be considered in answering the question which you have submitted. These provisions are contained in section 501 of the act, and reads as follows:

Section 501. Initial Determination of Compensation; Appeals.—The department shall promptly *examine any* claim filed and on the basis of the facts found by it, *shall determine whether or not the claim for compensation is valid*, and if valid, the week with respect to which compensation *shall commence, the weekly compensation payable, and the maximum duration thereof*. The claimant and other affected parties shall be promptly notified of the decision and the reasons therefor. Unless the claimant or other affected parties file an appeal from such decision with the board within ten calendar days after such notification was mailed to his last known post office address, and applies for a hearing, *such decision of the department shall be final and compensation shall be paid or denied in accordance therewith*. In the event that an appeal is filed with the board, the payment of compensation shall be withheld pending determination of the claim, but when a referee or the board affirms a decision of the department allowing compensation such compensation shall be paid notwithstanding any further appeal which may thereafter be taken. (Italics ours.)

Additionally section 403 provides that the weekly compensation rate must remain the same throughout the benefit year, as follows:

Section 403. Rate and Payment of Weekly Compensation.—Compensation shall be payable at the rate of fifty per centum of the employe's full-time weekly wage, but the amount shall not be more than fifteen dollars, nor less than seven dollars and fifty cents a week. An employe's weekly compensation amount, as determined for the first week of his benefit year, shall constitute his weekly compensation amount *throughout such benefit year*. Compensation shall be computed to the nearest multiple of five cents. Compensation shall be paid through employment offices at such times and in such manner as the department may prescribe.

It will be observed that under the foregoing provision of section 501, the department in making a determination of compensation upon an original claim is required to determine, among other things, the weekly compensation rate, which under the provisions of section 403 as stated, must remain the same throughout the benefit year, and the maximum number of weeks for which benefits shall be paid. Thus, the department in making an initial determination of compensation must actually establish and in its decision notify the claimant of the maximum total amount of compensation payable to him for and during the benefit year. It is, therefore, apparent that if section 404 were construed to require the department to make quarterly redeterminations of the amount of compensation, it would be impossible for the department to comply with the mandatory provisions of section 501 that it, at the time it makes an initial determination, determine and in its decision fix the total amount of compensation allowable for the entire benefit year to which the said initial determination relates. It will also be observed that section 501 further provides with respect to the initial determination of compensation that "such decision of the department shall be final and compensation shall be paid or denied in accordance therewith." It is, therefore, quite obvious that any construction of section 404 whereby quarterly redetermination of the amount of compensation were regarded as necessary would violate the principle of finality of decisions so clearly established in the above quoted provisions of section 501. This must be true since if your department were to change the amount of the award with each succeeding calendar quarter in the benefit year the "finality" of the initial determination would be completely destroyed. Furthermore, if quarterly redeterminations were put into practice it would be impossible to execute the mandatory provision of section 501 which states with respect to initial determinations that "compensation shall be paid or denied in accordance therewith."

Since the above quoted provisions of the Unemployment Compensation Law present a clear cut case of irreconcilable conflict between the word "each" in section 404 relating to the amount of compensation and

the mandatory provisions of section 501 relative to the making of determinations of compensation, it is pertinent to consider certain provisions of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. §§ 551 et seq. Section 63 of said Statutory Construction Act reads as follows:

Section 63. Particular Controls General. Whenever a general provision in a law shall be in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provisions shall prevail and shall be construed as an exception of the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the Legislature that such general provision shall prevail.

Section 404 provides generally for the amount of compensation payable whereas section 501 provides the particular procedure for determining the validity of claim, specified time when compensation shall commence, the weekly compensation payable, the maximum duration thereof, and further provides for the finality of such decision and calculations. Since a construction that the general provisions of section 404 require quarterly redeterminations of the amount of compensation would conflict with the particular provisions of section 501, the latter section must prevail.

Moreover, section 64 of the Statutory Construction Act, *supra*, provides:

Section 64. Irreconcilable Clauses in the Same Law.—Except as provided in section sixty-three, whenever, in the same law, several clauses are irreconcilable, the clause last in order of date or position shall prevail.

Since to hold section 404 to be controlling would cause an irreconcilable conflict with section 501, the provisions of the later section 501 must govern and determination of the weekly compensation payable and the maximum duration thereof shall be final for the entire period of the benefit year.

In view of the foregoing, we are of the opinion that under the provisions of the Unemployment Compensation Law, the Act of December 5, 1936, P. L. 2897, as amended, and the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. §§ 551 et seq., the plain and mandatory provisions of section 501 of the Unemployment Compensation Law prevail over the provision above referred to in section 404 of the said act and, therefore, the Department of Labor and Industry is not required to make quarterly redeterminations of the amount of a claimant's compensation; and, further, the amount of

compensation determined at the beginning of a benefit year shall be final and prevail throughout the benefit year.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 406

*Corporations—Corporate name—Use of word “securities”—Business Corporation Law of 1933, secs. 202 and 1002.*

1. The purpose of the provision of sections 202 and 1002 of the Business Corporation Law of May 5, 1933, P. L. 364, prohibiting the use of certain enumerated words in the corporate name of a business corporation, is to prevent the use by such corporations of names suitable only for banks, trust companies, building and loan associations, and public utilities which must be organized under other statutes.

2. The word “security” when used in the singular has at least two wholly distinct meanings, but when used in the plural means almost exclusively evidence of debt or of property, such as bonds or stocks.

3. Sections 202 and 1002 of the Business Corporation Law of May 5, 1933, as amended, prohibiting the use of the word “security,” do not prohibit the use of the word “securities” in the name of a business corporation irrespective of whether such corporation is a domestic or foreign corporation; this is so notwithstanding section 6(e) of the Business Corporation Law, expressly providing that the singular shall include the plural, as this statutory provision also contained in the Statutory Construction Act of May 28, 1937, P. L. 1019, is to be observed only if its application does not result in a construction inconsistent with the manifest legislative intent.

Harrisburg, Pa., December 1, 1941.

Honorable S. M. R. O’Hara, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Madam: You have asked to be advised whether a foreign business corporation organized for the purpose of dealing in investments, and having the word “securities” in its corporate name, may be granted a certificate of authority, in view of the fact that Sections 202 and 1002 of the Business Corporation Law (Act of May 5, 1933, P. L. 364), as amended, 15 P. S. §§ 2852-202 and 2852-1002, expressly prohibit the use of the word “security” in the corporate name.

In your request you state that you are fully aware of the fact that in Informal Opinion No. 1023, rendered to you under date of September 13, 1939, this department advised that it was not permissible to have the word "securities" in the corporate name of a domestic or foreign business corporation, but that you desire a review of that opinion.

Paragraph A of Section 202 of the Business Corporation Law, as last amended by the Act of July 31, 1941, P. L. 636, 15 P. S. § 2852-202, reads, in part, as follows:

\* \* \* The corporate name shall not imply that the corporation is an administrative agency of the Commonwealth or of the United States or is subject to the supervision of the Department of Banking or of the Insurance Department, and shall not contain the word "bank," "banking," "bankers," "savings," "trust," "deposit," "insurance," "mutual," "assurance," "indemnity," "casualty," "fiduciary," "benefit," "beneficial," "benevolent," "public service," "public utility," "building and loan," "surety," "security," "guaranty," "guarantee," "cooperative," "State," or "Commonwealth." (Italics ours.)

Paragraph (5) of Section 1002 of the Business Corporation Law, 15 P. S. § 2852-1002, provides that the Department of State shall not issue a certificate of authority to any foreign business corporation:

Which has as part of its name any word or phrase not permitted by this act to be a part of the name of a domestic business corporation.

In view of the foregoing statutory provisions, it would appear at first blush that a domestic or foreign business corporation would not be permitted to have the word "securities" in its corporate title, particularly since Section 6 E of the Business Corporation Law, 15 P. S. § 2852-6, expressly provides that "The singular shall include the plural." It was on this basis that Informal Opinion No. 1023 was decided.

Section 4 of the Business Corporation Law, as amended by the Act of July 2, 1937, P. L. 2828, 15 P. S. § 2852-4, expressly limits the scope of the law by providing that it does not apply to:

(3) Any corporation which, by the laws of this Commonwealth, is subject to the supervision of the Department of Banking, the Insurance Department, the Pennsylvania Public Utility Commission, or the Water and Power Resources Board.

The obvious purpose of the provisions in sections 202 and 1002, prohibiting the inclusion of certain enumerated words in the corporate name of a business corporation, is to supplement section 4 and prevent the use by business corporations of names suitable only for corpora-

tions,—such as banks, trust companies, building and loan associations, and public utility companies,—which must be organized under other statutes.

According to Webster's New International Dictionary, Second Edition, the word "security" means:

1. The quality or condition of being secure. \* \* \*

2. That which secures. \* \* \*

3. Law. a. Something given, deposited, or pledged, to make secure, or certain, the fulfillment of an obligation, the payment of a debt, etc.; property given or serving to render secure the enjoyment or enforcement of a right; surety; pledge; as, the security is poor. b. One who becomes surety for another, or engages himself for the performance of another's obligation; a surety.

4. Chiefly pl. An evidence of debt or of property, as a bond, stock certificate, or other instrument, etc.; a document giving the holder the right to demand and receive property not in his possession. \* \* \*

It will be noted that Webster points out that the plural of the word "security" is used in common parlance almost exclusively to mean evidences of debt or of property, such as bonds or stocks.

In McGraw's Estate, 337 Pa. 93 (1940), the Supreme Court defines the word "securities" as follows (page 95):

In common parlance, among all classes of people familiar with "securities," bankers, brokers, investors, speculators and lawyers, the term is used as signifying all classes of investments. \* \* \*

Moreover, the General Assembly itself, in passing The Pennsylvania Securities Act (Act of June 24, 1939, P. L. 748), as reenacted and amended by the Act of July 10, 1941, P. L. 317, 70 P. S. §§ 31, et seq., used the terms "security" and "securities" in the sense that they relate to investments.

Thus, it is apparent that the word "security," when used in the singular, has at least two wholly distinct meanings, but when used in the plural has one general meaning.

It is well known that banks, banks and trust companies and savings institutions frequently use the word "security" in their corporate names, particularly as such corporations are expressly authorized to receive personal property for safe-keeping. For example, banks, banks and trust companies or trust companies are authorized by Section 1001 of the Banking Code (Act of May 15, 1933, P. L. 624), as last amended

by the Act of July 29, 1941, P. L. 586, 7 P. S. § 819-1001, among other things:

(12) To receive, for safe-keeping, jewelry, plate, coin and other similar personal property, or bonds, mortgages, shares of stock, securities, and other valuable papers; and to rent out receptacles or safe deposit boxes for the deposit of such papers or of such personal property;

In view of the foregoing, it is obvious that a bank, bank or trust company, or trust company, or a savings institution might well have the title "X Security Trust Company," which would clearly indicate that the institution was of a type that could be incorporated only under the Banking Code and would be under the complete supervision of the Department of Banking. On the other hand, a corporation having the title "X Securities Company" would indicate that such a company was engaged in the sale of securities, which would be the function of a business corporation. It is obvious why the word "security" was prohibited by section 202, *supra*, from forming part of the corporate name of a business corporation. It likewise is clear why the word "securities" was not prohibited.

While it is true that the Business Corporation Law, in Section 6 E, 15 P. S. § 2852-6, expressly provides that "The singular shall include the plural," the fact remains that this statutory provision is to be applied only to the extent necessary to carry out the obvious intent of the legislature: see 59 C. J. Section 586, page 987.

In Article III of the Statutory Construction Act (Act of May 28, 1937, P. L. 1019), 46 P. S. §§ 501, *et seq.*, various statutory rules are set forth as a guide in the construction of the statutes of this Commonwealth, including the rule that the singular shall include the plural (Section 32, 46 P. S. § 532); however, it is expressly provided that such rules shall be observed only if the application of such rules does not result in a construction inconsistent with the manifest intent of the legislature (Section 31, 46 P. S. § 531).

As we have pointed out, the use of the word "security" in the corporate name of a business corporation is prohibited because the use of that word in the corporate name would imply that the corporation is of a type which may be formed only under the Banking Code and which is under the supervision of the Department of Banking. On the other hand, the use of the word "securities" in a corporate name would not raise such an implication. Accordingly, it is manifest that when the legislature prohibited the use of the word "security" it did not intend that the use of the singular also should include the plural of the word.

Accordingly, we are of the opinion that Sections 202 and 1002 of the Business Corporation Law (Act of May 5, 1933, P. L. 364), as amended, 15 P. S. §§ 2852-202 and 2852-1002, do not prohibit the use of the word "securities" in the name of a business corporation, irrespective of whether such corporation is a domestic or foreign corporation. Therefore, Informal Opinion No. 1023 is hereby overruled.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
Attorney General.

E. RUSSELL SHOCKLEY,  
Deputy Attorney General.

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OPINION No. 407

*Municipal corporations—Authority—Municipality Authorities Act of 1935—Rates and service outside corporate limits—Regulation by Public Utility Commission—Territorial limits of projects—Transfer of public utility's facilities to authority—Effect on pending rate cases—Public Utility Law of 1937—Statutory Construction Act of 1937.*

1. The Pennsylvania Public Utility Commission has jurisdiction over the rates and service of an authority organized pursuant to the provisions of the Municipality Authorities Act of June 28, 1935, P. L. 463, rendering public utility service outside the corporate limits of the municipality by which such authority is created.

2. An authority organized pursuant to the provisions of the Municipality Authorities Act of June 28, 1935, P. L. 463, may not acquire and operate its projects in every part of the Commonwealth; some part of each project so acquired and operated must be located within the incorporating municipality although the remainder may be situate outside its corporate limits.

3. A transfer of a public utility's facilities to an authority organized pursuant to the provisions of the Municipality Authorities Act of June 28, 1935, P. L. 463, pending a rate case which may involve possible refunds to consumers, will not abate or terminate the litigation, which will continue against the public utility until the rights of the consumers are finally adjudicated, and in the event of an award of reparation the consumers to whom refunds are due may recover in any court of common pleas, in addition to the amount of the refunds, a penalty of 50 percent together with all court costs and reasonable attorney's fees.

Harrisburg, Pa., December 3, 1941.

Honorable John Siggins, Jr., Chairman, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request to be advised regarding certain matters relating to the administration of the Public

Utility Law, the Act of Assembly approved May 28, 1937, P. L. 1053, 66 P. S. § 1101 et seq. You have submitted three questions for our consideration which will be stated and answered seriatim:

1. Whether or not the furnishing of water service by an "Authority" organized under the Municipal Authorities Act of 1935, P. L. 463 as amended, beyond the "corporate limits" of the municipality organizing the "Authority" constitutes the furnishing of service beyond the "corporate limits" of the "Authority" and, therefore, subject[s] [the Authority] to the jurisdiction of the Public Utility Commission as to rates and service?

We have examined the reported decisions of the several courts of this Commonwealth and, so far as we can ascertain, the extent of the Pennsylvania Public Utility Commission's jurisdiction, if any, over Authorities created pursuant to the provisions of the Municipality Authorities Act, the Act of Assembly approved June 28, 1935, P. L. 463, 53 P. S. § 2900 f, et seq., has never been considered therein. Lacking such judicial construction, therefore, it becomes necessary to examine the two statutes involved and endeavor to determine the fundamental intention of the legislature with respect to the question at issue.

Municipal corporations, with legislative sanction, for many years have been engaged in furnishing certain service, such as lighting, water supply, etc. not only to their inhabitants but to patrons residing outside their corporate limits. The Public Service Company Act of July 26, 1913, P. L. 1374, gave the Public Service Commission no power of supervision or regulation over the rates charged by such municipalities either for service rendered within or without their corporate limits (*Shirk v. Lancaster City*, 313 Pa. 158 (1933); *Ambridge Boro. v. Pa. P. U. C.*, 137 Pa. Super. Ct. 50 (1939)). The reasonableness of such rates was for the courts. The situation was changed, however, by the enactment of the Public Utility Law *supra*. Section 301 thereof, as amended by the Act of Assembly approved March 21, 1939, P. L. 10, 66 P. S. § 1141, provides:

Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission: Provided, That only public utility service being furnished or rendered by a municipal corporation, or by the operating agencies of any municipal corporation, beyond its corporate limits, shall be subject to regulation and control by the commission as to rates, with the same force, and in like manner, as if such service were rendered by a public utility.

And section 401 thereof (66 P. S. § 1171) provides, in part, that:

\* \* \* Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions with the same force and in like manner as if such service were rendered by a public utility.

The provisions of the foregoing sections of the Public Utility Law are clear and since the enactment thereof, there can be no question that the rates and service of a municipal corporation rendering public utility service beyond its corporate limits are subject to regulation and control by the Pennsylvania Public Utility Commission (*Ambridge Boro. v. Pa. P. U. C. supra*),

However obvious the intention of the legislature thus to subject such rates and service to regulation by the Commission, the situation becomes at the same time complex because of the inclusion of the following definitions in the Public Utility Law (section 2, 66 P. S. § 1102):

(15) "Municipal Corporation" means all cities, boroughs, towns, townships, or counties of this Commonwealth, and also any public corporation, authority, or body whatsoever created or organized under any law of this Commonwealth for the purpose of rendering any service similar to that of a public utility.

\* \* \* \* \*

(17) "Public Utility" means persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:

\* \* \* \* \*

(b) Diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation;

An authority, as the term is used in the above definition, manifestly includes a "body corporate and politic" organized pursuant to the provisions of the Municipality Authorities Act, *supra* (section 4, 53 P. S. § 2900 i), for the purpose of furnishing water to or for the public for compensation.\* The first question you have propounded arises

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\* Municipal authorities are an innovation in the field of municipal law, the first legislation authorizing their creation (restricted to counties of the second class) being the Act of Assembly approved December 27, 1933, P. L. 114 (Special Session 1933-34). This act was supplemented by the Municipality Authorities Act and under existing law it is possible for all municipal corporations of the Commonwealth, as that term is defined in Section 2 of the act, acting separately or jointly, to organize a body politic and corporate for the purpose of acquiring, holding, constructing, improving, maintaining, operating, owning and leasing, any of the numerous "projects" set out in Section 4 of the act (53 P. S. § 2900 i). Upon being brought into existence they become public corporations invested by the Legislature with the right to perform certain municipal functions; that such activities are distinctly proprietary, as opposed to governmental, is of no consequence (*Lighton et al. v. Abington Township et al.*, 336 Pa. 345 (1939)).

in consequence for, as applied to municipal authorities, the words "corporate limits" can conceivably refer only to the boundaries of the municipal corporation which creates an Authority or the territorial limits of the project acquired and operated by an Authority. The former meaning here must prevail for several reasons.

Section 2 of the Public Utility Law includes an Authority in its definition of the term "municipal corporation" but does not define the word. It is, however, defined in section 2 of the Municipality Authorities Act (53 P. S. § 2900 g) as "a body politic and corporate created pursuant to this act." The Statutory Construction Act, approved May 28, 1937, P. L. 1019, 46 P. S. § 533, provides that:

Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; \* \* \*

This rule is only a legislative expression of a long-established precept of statutory construction and here applied means merely that the legislature in using the words "body politic and corporate" intended to ascribe to them their usual and ordinary meaning, viz., a group or association of citizens with certain rights and privileges belonging to them by law in their aggregative capacity, organized for the purpose of exercising governmental functions (*Uricich v. Kolesar*, 54 Ohio App. 309, 7 N. E. (2d) 413 (1936); *Munn v. People of Illinois*, 94 U. S. 113, 24 L. ed. 77 (1877)). The group or association of citizens in the instant case are, of course, the citizens of any given municipality who, acting in their aggregative capacity through the municipal officers, create an Authority for the purpose of exercising governmental functions pursuant to the provisions of the Municipality Authorities Act. The Authority being the body of citizens of a municipal corporation who, through the corporate officers created it, the "corporate limits" of the Authority necessarily must be coterminous with those of the parent municipality.

Furthermore, as hereinbefore discussed, prior to the creation of the Pennsylvania Public Utility Commission, the Public Service Commission, its predecessor, had no power of regulation or supervision over the rates or service of a municipal corporation rendering public utility service. The reason this situation was remedied by the legislature when it enacted the Public Utility Law is obvious. For years patrons residing outside the corporate limits of a municipality furnishing public utility service were without redress, should exorbitant rates be charged, except to resort to litigation—too often lengthy and expensive. The residents of the municipality had, of course, in addition, that potent measure of control afforded by the ballot. Unquestionably the provisions of sections 301 and 401 supra

of the Public Utility Law, clear and definite as they are, represent the deliberate effort of the legislature to remedy an inequitable situation and to prevent the exercise of the rate-making power by public officials not subject to the control of the electorate.

The same reasoning applies with equal force to an Authority rendering public utility service beyond the limits of the parent municipality. True such an Authority is a separate business enterprise but the board, the corporate officers thereof, who fix rates and charges and generally manage and control the project, are citizens of, are appointed by the governing body of, the parent municipality and thus subject to the control of the electorate thereof—a privilege and protection not accorded those citizens residing outside the limits of the creating-municipality (Section 7, 53 P. S. § 2900 l). The need of the latter group for the protection afforded by the aforesaid provisions of the Public Utility Law is neither greater nor less whether the project is being operated by a municipality or by its creature, an Authority. The intention of the legislature to confer upon the Pennsylvania Public Utility Commission the power to supervise and regulate service rendered by a municipal corporation beyond its corporate limits is so plain that we cannot conceive that it meant to exclude from that regulation and supervision a municipality doing a public utility business under the guise of an Authority.

We have no difficulty in concluding, therefore, that an Authority, as the term is used in the Public Utility Law, means the entity, not the project acquired and operated by that entity, and that the Pennsylvania Public Utility Commission has jurisdiction over the rates and service of an Authority rendering public utility service outside the corporate limits of the parent municipality or municipalities.

2. Whether or not a municipality organizing an "Authority" under the Municipal Authority Act of 1935 P. L. 463 may undertake the projects provided for in the Municipal Authorities Act in any part of the Commonwealth, and if not what are the territorial limits of the projects which a municipality may undertake by an "Authority" organized by it?

The Municipality Authorities Act (Section 3, 53 P. S. § 2900 h) requires a municipality desiring to create an Authority to file with the Secretary of the Commonwealth articles of incorporation setting forth, *inter alia*, the name of the Authority, that it is to be formed under the said act, that no other Authority has been created by the municipality, the name of the incorporating municipality or municipalities and the names, address and terms of office of the first members of the board. If the Secretary of the Commonwealth finds the articles to be in proper form, that there has been compliance with the provisions of the act requiring the publication of notice and that the proper

fees have been paid, they are approved, filed and a certificate of incorporation is issued.

It will be noted that the articles of incorporation need not set out the purpose for which the Authority is formed; and, in fact, the certificate of incorporation fixes no territorial limits or boundaries of the Authority. It merely empowers the Authority to acquire, construct, operate, etc. any of the projects enumerated in section 4 of the act.

Prior to the amendment to section 9 of the Act of May 17, 1939, P. L. 167 (53 P. S. § 2900 n) there was, therefore, no specific limitation or inhibition in the act regarding the situs of projects to be undertaken by an Authority and it might have been argued that as originally passed the act authorized the construction or acquisition of a project in a part of the Commonwealth far removed from the parent municipality. This situation, however, we believe was clarified by the Act of May 17, 1939, P. L. 167, *supra*, which added to section 9 of the act the following:

This section, without reference to any other law, shall be deemed complete for the acquisition, by agreement, of projects, as defined in this act, located wholly within or partially without the municipality or municipalities causing such Authority to be incorporated, any provisions of other laws to the contrary notwithstanding; and no proceedings or other action shall be required except as herein prescribed.

The meaning of the words "wholly within or partially without" is clear and by their use it is obvious that the legislature intended specifically to impose territorial limits as to existing facilities which may be acquired by an Authority and operated as a project; some part of each project must be located within the incorporating municipality although the remainder may be situate without its corporate limits. For example, an Authority may acquire a water supply system serving several townships or even counties providing some part of that system serves the inhabitants of the municipality causing the creation of the Authority.

While it is true that the above limitation is imposed specifically only as to existing facilities which may be acquired by an Authority, and not to original construction, we are of the opinion that the legislature never intended to authorize the formation of authorities for the purpose of acquiring and operating projects indiscriminately in any part of the Commonwealth in competition with other legitimate business enterprise. The result sought to be accomplished by any statute must always be considered when that law is construed and interpreted. Clearly the legislature, in enacting the Municipality Authorities Act, intended only to enable municipal corporations to acquire and operate

projects situate in and near the parent municipality; and that would primarily, directly benefit and serve the citizens of that municipality even though the operation thereof might incidentally inure to the benefit of the residents of surrounding territory.

3. Where the Commission has a rate case pending against a public utility furnishing water service and possible refunds may be due to consumers, does the rate case abate or terminate at the time the utility transfers its property to an "Authority"? If the rate proceeding does not abate, does the proceeding continue against the utility or the "Authority," and how shall the payment of refunds be enforced?\*

Although the precise questions here involved have not heretofore been passed upon by the courts of this Commonwealth, an examination of available authority leads us to conclude that a transfer by a public utility of its facilities and other property to an Authority during the pendency of a rate case will not render moot such proceeding. In *Grosbeck et al. v. Duluth, South Shore and Atlantic Railway Company*, 250 U. S. 607 (1919), the Michigan Legislature in 1907, pursuant to constitutional authority, fixed a rate of two cents a mile as the maximum intrastate passenger fare on railroads operating in the Lower Peninsula and three cents a mile for those in the Upper Peninsula in the State of Michigan. By act of May 2, 1911, the two-cent rate was made applicable to all the railroads of the state whose gross earnings on passenger trains equaled or exceeded \$1,200.00 per mile of line operated. Before the statute took effect, the Duluth, South Shore and Atlantic Railway Company, an interstate carrier operating in the Upper Peninsula, brought suit in the District Court of the United States for the Eastern District of Michigan to enjoin the enforcement of the act. The bill alleged that the reduced rate would deprive plaintiff of its property without due process of law in violation of the fourteenth amendment. The attorney general and the railroad commissioners of the state, being charged by the law with its enforcement,

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\* Section 313 of the Public Utility Law (66 P. S. § 1153) provides in part as follows:

(a) If, in any procedure involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within two years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. \* \* \*

(b) If the public utility fails to make refunds within the time for payment fixed by any final order of the commission, or any appellate court, \* \* \* any patron entitled to any refund may sue therefor in any court of common pleas of this Commonwealth, \* \* \*."

were made defendants. They denied that the rate was confiscatory; and on this issue the district court found for the railway. A final decree granting the relief sought was filed February 14, 1918, and an appeal to the Supreme Court of the United States was allowed. Meanwhile, on January 1, 1918, the Federal Government had taken over the operation of the railroads. The two-cent rate was never put into effect on this railroad, as a restraining order issued upon the filing of the bill was continued until entry of the final decree. In 1919 the statute attacked was repealed.

The Supreme Court of the United States in holding that the case had not become moot said:

On continuing the restraining order the Railway was required to issue to all intrastate passengers receipts by which it agreed to refund, if the act should be held valid, the amount paid in excess of a two-cent fare. Later the Railway was required to deposit, subject to the order of the court, such amounts thereafter collected. The fund now on deposit exceeds \$800,000, and the refund coupons are still outstanding. In order to determine the rights of coupon holders and to dispose of this fund it is necessary to decide whether the Act of 1911 was as respects this railroad, confiscatory.

In *Glens Falls Portland Cement Co. v. Delaware & Hudson Company et al.*, 55 Fed. (2d) 971 (1932), an action was brought to enforce a reparation order dated August 14, 1930, of the Interstate Commerce Commission allowing a recovery to the Glen Falls Portland Cement Co. in the sum of \$12,588.63 with interest, against the Delaware & Hudson Company, the New York, New Haven and Hartford Railroad Company and the New York, Ontario and Western Railway Company.

The basis of the reparation order was that within the period of two years antecedent to the plaintiff's application to the Commission for relief the three railroads against which the order was aimed charged the plaintiff unjust and unreasonable rates on shipments of cement moving over their lines from Glens Falls, New York, to New England destinations.

The complaint had been filed on August 27, 1926. The reparation order of the Commission did not issue until August 14, 1930. While the complaint was pending, to wit, on November 14, 1929, the Delaware & Hudson Company filed with the Commission an application in which leave was sought by the company to transfer all its railroad property to a new corporation formed for the purpose of taking over these properties. The Commission granted the application on January 16, 1930, permitting abandonment effective as of April 1, 1930. The Delaware & Hudson Company set up as a defense in the reparation

proceeding that by reason of the order of the Commission which permitted it to abandon operations effective April 1, 1930, and allowed it to transfer all its property and operations to another corporation, it ceased on that date to be engaged in interstate commerce as a carrier, became a private company, and was no longer subject to any power over carriers conferred by Congress upon the Commission; and that, therefore, the reparation order which was entered subsequent to this change of status was wholly ineffectual and void as against it.

The court, at pages 980 and 981, said:

I am told that this raises an entirely novel point, and it may well be so, for I fancy that instances are rare where a corporation, which is a solvent going concern under the jurisdiction of the Commission, is allowed to transfer its carrier properties to another corporation, and thus put itself outside of the ambit of the Commission's administrative powers.

It is common ground between the parties, of course, that after this change of status on April 1, 1930, the Commission would have been powerless to have issued any regulatory orders against the D. & H., and, of course, thereafter there could not have arisen any basis for any reparation orders against it because it was no longer a carrier, and the question of reasonable rates would be entirely foreign to it.

But here we have a case where a proceeding was pending against the D. & H. at the time when its status changed. It had been represented on this hearing by counsel, of whom one represents it here, and therefore, it had knowledge of the hearing and of the report of the Commission which was rendered thereon almost a year before the certificate of convenience was allowed to it.

The situation of the D. & H. at the time when it thus changed its status was, it seems to me, juridically analogous to that of a defendant against whom an interlocutory decree had been rendered involving injunctive relief and incidental damages for past torts which remained to be proved.

Analogies are not far to seek. If a suit in equity had been brought in this court—say for unfair competition—in which the jurisdiction over the subject-matter was based on diversity of citizenship and the amount involved in the controversy, and in that suit an interlocutory decree had been granted to the plaintiff providing for an injunction and for an accounting, the jurisdiction of this court could not have been ousted by the defendants becoming citizens of the same state as the plaintiff after that decree, or by a voluntary reduction on the part of the plaintiff of the amount claimed, or by change of any other circumstances on which subject-matter jurisdiction once acquired was based. *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 145, 146, 24 S. Ct. 619, 48 L. Ed. 911; *Louisville, etc., Ry. Co. v. Louisville Trust Co.*, 174 U. S.

552, 566, 19 S. Ct. 817, 43 L. Ed. 1981; *Koenigsberger v. Richmond Silver Mining Co.*, 158 U. S. 41, 49, 50, 15 S. Ct. 751, 39 L. Ed. 889; *Clarke v. Mathewson*, 12 Pet. 165, 9 L. Ed. 1041; *Morgan's Heirs v. Morgan et al.*, 2 Wheat. 290, 297, 4 L. Ed. 242; *Lebensberger v. Scofield*, 139 F. 380, 384 (C.C.A. 6); *Ex parte Kyle* (D.C.) 67 F. 306, 309; *Hatfield v. Bushnell*, 1 Blatchf. 393, 11 Fed. Cas. 814, 815, No. 6211.

Similarly if, in a case where suit on the patent had been brought in this court, the patent on which the court's subject-matter jurisdiction was based should expire during the pendency of the suit, of course an injunction in such a case would not be granted; but the court would not lose jurisdiction and could continue the suit of the accounting incidental to past torts involved in trespasses by infringement. *Beedle v. Bennet*, 122 U. S. 71, 75, 7 S. Ct. 1090, 30 L. Ed. 1074.

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I hold, therefore, that the reparation order must have the same juridical status against the D. & H. in this case as against the other two defendants who are still, as carriers, within the jurisdiction of the Commission. In other words, the D. & H. retired to private life cum onere of these past misdeeds.

See also *Abilene & So. Ry. Co. et al. v. Terrell et al.*, 131 S. W. 2d (1939); *Southern Pacific Company and Oregon & California Railroad Company, Appts., v. Interstate Commerce Commission*, 219 U. S. 432 (1910).

Although neither of the cases cited was decided by the courts of this Commonwealth, nor did they concern the laws thereof, we believe that their application to the question at issue is clear and the legal principles therein enunciated are sound. Consequently, as hereinbefore indicated, we are of the opinion that a transfer of the facilities of a public utility to an Authority during the pendency of a rate case which may involve possible refunds to consumers will not abate or terminate the litigation and that the same will continue until the rights of the consumers are finally adjudicated.

In considering the other phase of your final inquiry, one fundamental proposition must be borne in mind, viz., that a patron of a public utility who has been charged an unreasonable rate for the service rendered has a property right in the excess payment which is recognized by, and enforceable under, the common law.

As said by the Superior Court of this Commonwealth in *Centre County Lime Company et al., Appellants v. Public Service Commission*, 96 Pa. Superior Ct. 590 (1929) at page 602:

\* \* \* If a shipper has been charged an unreasonable rate he has a property right in the excess payment—a right recog-

nized by, and enforceable under, the common law (Texas and Pacific Railway Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426)—and we are not prepared to say that the commission has been given the power to take away that right. The manner in which the right may be enforced has been modified by the Public Service Company Law; “no action shall be brought in any court” to enforce it, “unless and until” the commission shall have determined that the rates paid were unreasonable, “and then only to recover such damages as may have been awarded . . . by the commission.” We think this is as far as the statute was intended to go, and that a claimant for reparation is still entitled to his day in some court.

(See also Centre County Lime Company, Appellants *v.* P. S. C., 103 Pa. Superior Ct. 179 (1931)).

The case of *Merwine v. Mt. Pocono Light and Improvement Company*, 304 Pa. 517 (1931), we believe to be decisive of the phase of the question here under discussion. In that case an action for negligence had been brought against the Mt. Pocono Light and Improvement Company prior to a transfer of the franchises and property of the company to the Pennsylvania Power and Light Company, which transfer had the approval of the Public Service Commission.

After the conveyance, the Mt. Pocono Light and Improvement Company filed a suggestion that the property had been conveyed, that the defendant had ceased to exist, and that the action should be abated. The plaintiff also in that proceeding sought to substitute the Pennsylvania Power and Light Company, transferee of the property, as defendant. The trial court denied substitution and abated the action.

The Supreme Court in reversing the trial court said the following:

\* \* \* “According to the old settled common law, upon the civil death of a corporation, . . . all the debts due to and from it [were] totally extinguished [but] the rule of the common law has become obsolete and odious. The sound doctrine now is that the capital and debts of corporations constitute a trust fund for the payment of creditors and stockholders and a court of equity will lay hold of the fund and see that it be duly collected and applied. The death of a corporation no more impairs the obligation of contracts than the death of a private person.” Defendant corporation not having been legally dissolved, its present condition is rather that of an inactive corporation and it is not altogether dead. Before a corporation has ceased to exist in the absolute sense here contended for, it must fully and definitely close its affairs, and the fact that a corporation has “ceased to do business” does not preclude it from exercising its various rights to accomplish this purpose \* \* \*.

It is admitted the present plaintiff stands in the position of a creditor of defendant corporation, as she holds a claim

which vests before the corporation sold its property. A person having a cause of action capable of adjustment and liquidation upon a trial, is a creditor: \* \* \* It is immaterial whether the cause arose out of contract or tort: \* \* \* In the present case the claim arose out of what plaintiff alleges as negligence of defendant company. Defendant now seeks to avoid liability to plaintiff by selling its property and contending that, for the purpose of participation in a law suit, it no longer exists. To permit evasion of that character under section 5 of the Act of 1876, which obviously was never intended to work such hardship, would open the door to corporations seeking to evade their obligations to effectively accomplish the purpose by simply transferring their property to other incorporated bodies after suits were begun against them. As we said in *B. & S. v. Musselman*, 2 Grant 348, 352, where there was an attempt to evade liability by consolidation of two corporations, "a court of justice would not . . . attribute to the law making power an intention of enabling [corporations] to discharge their liabilities in such a summary way."

\* \* \* \* \*

\* \* \* Whatever the liability of the Pennsylvania Power & Light Company may or may not prove to be, we pass that point and note that the proper course at the present state of proceedings requires plaintiff first to proceed to judgment against defendant if she can, and, having secured judgment, to levy where defendant's assets liable for the judgment may be found.

It would appear, therefore, that the courts would never permit a public utility to defeat the enforcement of a property right merely by the simple expedient of transferring its facilities to another. The consideration received by the utility, along with other capital, is a trust fund for the payment of creditors and courts of equity will, as indicated in *Merwine v. Mt. Pocono Light and Improvement Company*, supra, lay hold of that fund and direct its proper application. The patron who has paid an unreasonable rate, acting individually or collectively with others of the same class, is, of course, required to proceed in conformity with the provisions of section 313 of the Public Utility Law, supra, but in a proper case, having brought suit and recovered judgment, his right to collect the amount due is not impaired merely because the judgment debtor is no longer furnishing public utility service.

In view of the foregoing we are of the opinion and you are advised that:

1. The Pennsylvania Public Utility Commission has jurisdiction over the rates and service of an Authority organized pursuant to the provisions of the Municipality Authorities Act, approved June 28, 1935, P. L. 463, 53 P. S. § 2900 f, et seq., rendering public utility

service outside the corporate limits of the municipality which causes the creation of such Authority.

2. An Authority organized pursuant to the provisions of the Municipality Authorities Act, the Act of Assembly approved June 28, 1935, P. L. 463, 53 P. S. § 2900 f, et seq., may not acquire and operate the projects provided for in said act in every part of the Commonwealth; some part of each project so acquired and operated must be located within the incorporating municipality although the remainder may be situate without its corporate limits.

3. A transfer of the facilities of a public utility to an Authority organized pursuant to the provisions of the Municipality Authorities Act, approved June 28, 1935, P. L. 463, 53 P. S. § 2900 f, et seq., pending a rate case which may involve possible refunds to consumers will not abate or terminate the litigation and the same will continue against the public utility until the rights of the consumers are finally adjudicated. If in such rate case the Pennsylvania Public Utility Commission determines that the rates in question were unjust or unreasonable, or in violation of any regulation or order of the Commission, or in excess of the applicable rate contained in a tariff in effect at the time the litigation was instituted and the public utility fails to make refunds within the time for payment fixed by the final order of the Commission, or any appellate court, the consumers to whom the refunds are due may institute suits therefor in any court of common pleas of this Commonwealth and recover, in addition to the amount of the refunds, a penalty of fifty percentum of the amount of such refund together with all court costs and reasonable attorney's fees.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

FRED. C. MORGAN,  
*Deputy Attorney General*

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OPINION No. 408

*Weights and measures—Right to sell poultry by unit—Act of July 24, 1913, sec. 2.*

Under section 2 of the Act of July 24, 1913, P. L. 965, providing that dry commodities may be sold by weight, dry measure, or numerical count, it is legal to sell poultry in package form at a certain price per package, where each package is marked with its net weight; the act was apparently intended to protect the public against fraud or deception and the information as to the weight removes any chance of imposition on the purchaser.

Harrisburg, Pa., December 10, 1941.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs,  
Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether it is lawful to sell poultry, wrapped in cellophane or in package form, each package being marked with the net weight, at a certain price per package. Your inquiry involves the interpretation of Section 2 of the Act of July 24, 1913, P. L. 965, 76 P. S. § 242, which reads:

All liquid commodities, when sold in bulk or from bulk, shall be sold by weight or liquid measure. All dry commodities, when sold in bulk or from bulk, shall be sold by weight, dry measure or numerical count. \* \* \*

The first section of the said act above referred to defines the word "commodity" as "any tangible personal property sold or offered for sale": 76 P. S. § 241. Obviously, poultry is a dry commodity within the above definition, and has been so held in the case of *Commonwealth v. The Great Atlantic & Pacific Tea Company*, *infra*.

The second section above quoted provides that dry commodities shall be sold by weight, dry measure or numerical count.

You state that the question arises because of three conflicting opinions which you received, to wit: (1) A letter of the Department of Justice, dated March 25, 1935; (2) Opinion of Honorable Eugene V. Alessandrini, Judge of the Court of Quarter Sessions of Philadelphia County, (unreported); and (3) Opinion of Honorable Gerald F. Flood, also Judge of the same court, in *Commonwealth v. The Great Atlantic & Pacific Tea Company*, 35 D. & C. 288 (1938).

The first two opinions hold that the sale of poultry under the act in question must be by weight, and the reason assigned for the conclusions in both opinions is that it has previously been the usage and custom to sell poultry by weight. The third opinion holds that the sale of poultry under the act in question may be by weight or numerical count.

Apparently, the act in question was intended to protect the purchasing public against fraud or deception as to the quantity or amount of the commodity offered for sale. However, your inquiry states that the package is marked on the wrapper with the weight of the net contents; so if the purchaser is interested in the weight, the information is present and there is no chance for imposition on the purchaser.

Judge Flood in his opinion points out the fallacy of the reasoning in the opinion of Judge Alessandrini, when he says (290):

\* \* \* We hesitate to disagree with the authority of this opinion, but its logic would lead us into other positions to which we could not agree. Potatoes and other vegetables for instance were, we think, sold almost universally by dry measure prior to 1913. They are now sold almost exclusively by weight. The newer method operates the better to protect the purchaser, yet the logic in the opinion quoted would make it illegal to sell potatoes or other vegetables by weight. \* \* \*

The letter of the Department of Justice, dated March 25, 1935, is based on the same logic as the opinion of Judge Alessandroni, with which logic we cannot agree and the said letter is overruled.

The act of 1913, *supra*, is a criminal statute and must be strictly construed, and, when the act says all dry commodities shall be sold by weight, dry measure or numerical count, it means just what it says.

The court further stated, in the case of *Commonwealth v. Tea Company*, *supra*, at page 289:

\* \* \* Upon the face of the act numerical count is a legal method of selling a chicken, which is a dry commodity. Any such commodity may be sold by weight or by dry measure or by numerical count. The seller may use any of the methods for any dry commodity. \* \* \*

Therefore, it is our opinion that poultry in package form may legally be sold at a certain price per package, or, in other words, by numerical count.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ROBERT E. SCRAGG,  
*Deputy Attorney General*

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Opinion No. 409 withdrawn

Opinion No. 411 substituted

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OPINION No. 410

*Public officials—Vacancies—Appointment by Governor—Expiration of Commissions—Date—General and municipal elections—Primaries—Art. IV, sec. 8 of the Constitution—Act of June 3, 1937, P. L. 1333.*

Commissions issued by the Governor to persons appointed by him to fill vacancies in elected public offices, or the office of justice of the peace or alder-

man, which occur subsequent to the tenth Tuesday preceding the fall primary election in any odd-numbered year must expire the first Monday of January following the second succeeding municipal election. The election code of June 3, 1937, P. L. 1333, provides for special elections to fill vacancies in the following offices only: (1) United States Senator, (2) Representative in Congress, (3) Member of the General Assembly. It is impossible for the electorate, at a municipal election, to fill a vacancy which occurs in any of the offices specified later than the tenth Tuesday preceding the fall primary election.

Harrisburg, Pa., January 14, 1942.

Honorable J. Paul Pedigo, Secretary to the Governor, Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your recent request for advice regarding the proper expiration date of commissions issued by the Governor to persons appointed by him to fill vacancies in elected county offices, or the office of justice of the peace or alderman, which occur more than two months before the next municipal election but subsequent to the date when, as required by the provisions of the Pennsylvania Election Code, the Act of Assembly approved June 3, 1937, P. L. 1333, 25 P. S. § 2601 et seq., the first action must be taken to accomplish the nomination of candidates for such offices in the primary election preceding said municipal election.

You advise us that heretofore, in conformity with the provisions of Article IV, Section 8 of the Constitution of this Commonwealth,\* when such a vacancy has occurred within two months of the next municipal election a commission has issued to the Governor's appointee for a term ending the first Monday of January following the second succeeding municipal election; but that if it occurred more than two months prior to the next municipal election the vacancy has been filled only to the first Monday of January following such election.

We believe that the question involved is ruled by two recent decisions of the Supreme Court, viz., *Watson, Appellant v. Witkin, et al.*, 343 Pa. 1 (1941) and *O'Neill et al v. White et al.*, 343 Pa. 96 (1941). In the former case a vacancy in the office of Mayor of Philadelphia occurred on August 22, 1941, eighteen days before the fall primary election. Since the office would not ordinarily have been filled at the next municipal election, no nomination petitions or papers had been filed on behalf of any candidates therefor. It was, of course, impos-

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\* Article IV, Section 8 of the Constitution provides, in part, as follows:

\* \* \* but in any such case of vacancy, in an elective office, a person shall be chosen to said office on the next election day appropriate to such office according to the provisions of this Constitution, unless the vacancy shall happen within two calendar months immediately preceding such election day, in which case the election for said office shall be held on the second succeeding election day appropriate to such office.

\* \* \*

sible under the provisions of the Code to nominate any candidates for the office at the following fall primary election and the question arose whether the vacancy could be filled at the next municipal election on November 4, 1941. The court below decided that the nomination of candidates for the office should be left to the political parties to be selected in accordance with their rules and regulations and that certificates of nomination from these parties be accepted by the County Board of Elections and used in preparing the official election ballots for the municipal election. Although the office involved is not one of those mentioned in your inquiry, the underlying legal principles are so decisive of the question here at issue that we quote at length from the opinion of the Supreme Court, reversing the decision of the Court of Common Pleas of Philadelphia County:

\* \* \* Under the Election Code of June 3, 1937, P. L. 1333, 25 P. S. 2601, (hereinafter referred to as "the Code") certain legal steps must be taken by proper public officials for the nomination each year of candidates for offices to be filled at the ensuing November election, as early as "on or before the tenth Tuesday preceding the Fall primary." Section 904 of Article 9 of the Code (25 P. S. 2864) provides that: "To assist the respective county boards in ascertaining the offices to be filled, it shall be the duty of the clerks or secretaries of the various cities, boroughs, towns, townships, school districts and poor districts, with the advice of their respective solicitors, on or before the tenth Tuesday preceding the Fall primary, to send to the county boards of their respective counties a written notice setting forth all city, borough, town, township, school district and poor district offices to be filled in their respective subdivisions at the ensuing municipal election, and for which candidates are to be nominated at the ensuing primary . . ." Section 905 of Article 9 of the Code (25 P. S. 2865) provides: "On or before the tenth Tuesday preceding each primary, the Secretary of the Commonwealth shall send to the county board of each county a written notice designating all the offices for which candidates are to be nominated therein, or in any district of which such county forms a part, or in the State at large, at the ensuing primary, and for the nomination to which candidates are required to file nomination petitions in the office of the Secretary of the Commonwealth, . . ."

\* \* \* \* \*

Section 907 of Article 9 of the Election Code (25 P. S. 2867) provides that "the names of candidates . . . for party nominations . . . shall be printed upon the official primary ballots . . . of a designated party, upon the filing of separate nomination petitions in their behalf, in form prescribed by the Secretary of the Commonwealth, signed by duly registered and enrolled members of such party who are qualified electors . . . of the political district . . . within which the nomination is to be made or election is to be held. The name of no

candidate shall be placed upon the official ballots to be used at any primary, unless such petition shall have been filed in their behalf." Clause 9d of Section 913 of Article 9 of the Election Code (25 P. S. 2873) provides that "all nomination petitions shall be filed at least fifty days prior to the primary." These and other provisions of the Code prove the impossibility of placing on the ballot or on the voting machine used in the November 4th election in Philadelphia *any nominee for the office of Mayor*. Yet despite this fact appellants contend that a Mayor must be chosen at the forthcoming municipal election on the date named.

Section 42 of Article 2 of the Charter Act of Philadelphia (Act of June 25, 1919, P. L. 581) reads as follows: "When a vacancy shall take place in the office of mayor, a successor shall be elected for the unexpired term at the next election occurring more than thirty days after the commencement of such vacancy, unless such election should occur in the last year of said term, in which case a mayor shall be chosen by the council by a majority vote of all the members elected thereto."

If we construe that section *literally* it means that a Mayor of Philadelphia must be elected on November 4th next. If "next election" means *that* next election held at a date so far ahead of the date the vacancy arose as to give the entire electoral machinery prescribed by law, including the machinery of "primary" elections, whose due functioning the law declares *shall* be a preliminary to the "final" elections, time to function, then the election of a Mayor *cannot* be held on November 4th next.

\* \* \* \* \*

The Uniform Primary Law has completely integrated nominations for public office with the election which takes place in November following such nominations. Under the Code the electoral machinery to choose public officials at any November election must begin to function at least "ten Tuesdays" before the date of the Fall primary. Section 604, article 6 of the Code, (25 P. S. 2754), provides that "candidates for all offices to be filled at the ensuing municipal election shall be nominated at the Fall primary." There is a similar provision in Section 902, article 9 of the Code (25 P. S. 2862), which adds that candidates "shall be elected in no other manner."

\* \* \* \* \*

\* \* \* Since a Mayor under the charter must be chosen at a *Municipal* Election, and not at a *General* election,\* it

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\* A similar prescription respecting the offices mentioned in your inquiry is to be found in Article VIII, Section 3 of the Constitution of this Commonwealth which provides that "All elections for judges of the courts for the several judicial districts, and for county, city, ward, borough, and township officers, for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto: Provided, That such elections shall be held in an odd-numbered year; \* \* \*."

follows that a Mayor of Philadelphia cannot be elected until the next Municipal Election *after* the 1941 Municipal Election, unless there is some statutory provision for a special election for Mayor to be held at the time of the General Election in 1942. There is no such provision in the Election Code of 1937 or elsewhere. This Code provides for special elections to fill vacancies in the following offices only: (1) United States Senator, (2) Representative in Congress, (3) Member of the General Assembly. Special elections are also provided for "on a proposed constitutional amendment or other question, to be voted on by the electors of the state at large or by the electors of any political district." (See 25 P. S. 2787 and 3069).

O'Neill et al. Appellants *v.* White et al., *supra*, is directly in point. In that case the Register of Wills of Westmoreland County, an elected county official, died on August 22, 1941, seventy-three days before the Municipal Election of 1941. A question arose as to whether the vacancy could be filled at that municipal election and several taxpayers filed a bill in equity to restrain the County Board of Elections from expending public funds in the publication of notices of an election to fill the office. The court below refused to grant an injunction and on appeal this decision was reversed. In the Supreme Court the appellees (defendants below) relied upon the provisions of Article IV, Section 8 of the Constitution, *supra*, contending that its provisions are mandatory and would require the holding of an election to fill the vacancy which had occurred more than two months before the next appropriate election day, i. e. the municipal election.

Beside citing at length from its opinion in *Watson*, Appellant *v.* Witkin et al., *supra*, the Supreme Court said:

The Constitutional provision invoked by appellees is unavailing in this case, for this provision is not self-executing and its mandate cannot be carried out because the legislature has not provided the means for doing so. "A Constitution is primarily a declaration of principles of the fundamental law. Its provisions are usually only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing." 6 R. C. L., section 52, p. 57.

\* \* \* \* \*

It is obvious that the above cited mandate of Article 4, Section 8 of the Constitution assumes the existence of election machinery to carry it out. But the election machinery provided by the Election Code is not geared to the carrying out of that constitutional mandate. For the reasons we have stated in the opinion this day filed in the "Philadelphia Mayoralty Election Case," i. e. *Watson v. Witkin, Clark and*

Hennessey, County Commissioners of Philadelphia, Constituting the County Board of Election of Philadelphia, et al., defendants, and County Executive Committee of the Democratic Party of the City and County of Philadelphia, et al., as intervening defendants, the Uniform Primary Laws of this state completely integrate nominations for public office with the elections which take place in the November following such nominations, and under the Election Code of 1937 the electoral machinery to choose such public officials at any November election must begin to function at least "ten Tuesdays" before the date of the Fall primary.

The conditions precedent to the nomination of candidates for Register of Wills of Westmoreland County at the September ninth 1941 primaries not having been complied with because there was no time in which to do so after the death of the Register of Wills on August 22, 1941, no election to fill that office can be held at the Municipal election of November 4, 1941.

Section 60 of the Act of June 9, 1931 P. L. 401, 406, provides as follows: "In case of a vacancy, happening by death, resignation or otherwise, in any county office created by the Constitution or laws of this Commonwealth, and where no other provision is made by said Constitution, or by the provisions of this act, to fill said vacancy, it shall be the duty of the Governor to appoint a suitable person to fill such office, who shall continue therein and discharge the duties thereof until the first Monday of January next succeeding the first Municipal election which shall occur two or more months after the happening of such vacancy. Such appointee shall be confirmed by the Senate, if in session." Such being the law the Governor should appoint a Register of Wills for Westmoreland County to serve until the first Monday of January, 1944, as that will be the first Monday of January next succeeding the first Municipal election which will occur two or more months after the happening of the vacancy so arising on the first Monday of January, 1942, and at which a successor may be elected. \* \* \* *O'Neill et al., Appellants v. White et al.*, 343 Pa. 96, 99, 100, 101 (1941).

We are not unmindful of the decision of the Court in *Cavalcante v. O'Hara*, Secretary of the Commonwealth, 36 D. & C. 139 (1939), 47 Dauphin County Reporter 348. In that case there was a vacancy in the office of judge which occurred on July 16, 1939 by reason of the death of the incumbent. A nomination petition was presented to the Secretary of the Commonwealth by Mr. Cavalcante, a candidate for the office, but was refused on the ground that the office was not designated in the written notice sent by the Secretary of the Commonwealth to the County Board of Elections of Fayette County, pursuant to Section 905 of the Code, as an office for which candidates were to be nominated at the fall primary election in 1939. Mr. Cavalcante then made application for a writ of mandamus which, subsequently, the

court allowed and directed the Secretary of the Commonwealth to receive the petition. No appeal was taken from the court's judgment but, in view of the decisions of the Supreme Court in *Watson*, *Appellant v. Witkin, et al.* and *O'Neill v. White*, *supra*, there can be no question but that the lower court would have been reversed.

The practical effect of these decisions upon the present question is greatly to extend the period of "two calendar months" specified in Article IV, Section 8 of the Constitution, *supra*. Since the Code provides no method for the nomination of candidates for the offices under discussion where a vacancy occurs subsequent to the date when the nomination machinery provided by it *must* start to function, since nominations for public office are completely integrated with the election which occurs in November following such nominations, it is obviously impossible for the electorate, at a municipal election, to fill a vacancy which occurs in any of the offices specified later than the tenth Tuesday preceding the fall primary election.

In view of the foregoing we are of the opinion, and you are advised, that commissions issued by the Governor to persons appointed by him to fill vacancies in elected county offices, or the office of justice of the peace or alderman, which occur subsequent to the tenth Tuesday preceding the fall primary election in any odd-numbered year must expire the first Monday of January following the second succeeding municipal election.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

FRED. C. MORGAN,  
*Deputy Attorney General*

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OPINION No. 411

(Substituted for No. 409)

*Police—Volunteer police officers—Commissions—Fee for issuance and filing—Eligibility of nonresident to serve—Acts of July 18, 1917, April 6, 1830, and May 2, 1929.*

1. Under the Act of July 18, 1917, P. L. 1062, providing for appointment by the Governor of volunteer police officers during a time of war, no fee may be charged by anyone upon the issuance of a commission to such a police officer; the act is a war measure and not a revenue-producing statute.

2. A recorder of deeds may not collect any sum for commission of a volunteer police officer received by such recorder for filing in his office; section 4 of the Act of April 6, 1830, P. L. 272, relating to fees collectible by the recorder of

deeds for recording written instruments, does not apply because commissions of volunteer police officers are not recorded, and section 55 of the Act of May 2, 1929, P. L. 1278, providing for the recording of commissions received by county officers from the Governor has no application because volunteer police officers are not county officers.

3. A nonresident of Pennsylvania may be appointed and commissioned as a volunteer police officer.

Harrisburg, Pa., January 16, 1942.

Honorable S. M. R. O'Hara, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Madam: By your communication of December 30, 1941 you requested us to advise you upon the following questions raised in connection with the Act of July 18, 1917, P. L. 1062, 35 P. S. §§ 1421-1424, an act providing for the appointment by the Governor of volunteer police officers during time of war.

The questions submitted by you were as follows:

1. Must a volunteer police officer wear a uniform while engaged in police service?

2. May a volunteer police officer carry a firearm?

3. If a volunteer police officer is injured or incapacitated in the performance of his duty, who or what agency, if any, is liable for

(a) workmen's compensation;

(b) or other liability?

4. What fee, if any, may be charged upon the issuance of a commission to a volunteer police officer

(a) by the Secretary of the Commonwealth; (b) by the municipality or industry which requests the appointment and commission of such officer, and (c) if a fee is chargeable, by whom shall it be paid?

5. Shall the recorder of deeds collect and remit to the Commonwealth the sum of fifty cents for each commission received by him and filed in his office under said act?

6. May a non-resident of Pennsylvania be appointed and commissioned as a volunteer police officer?

7. May a sheriff of a county certify on behalf of an industry to the need for an appointment of and commission to a volunteer police officer?

As a result of your foregoing inquiries we issued and directed to you Formal Opinion No. 409, dated January 8, 1942, advising you

concerning certain of the foregoing questions. Said opinion is hereby withdrawn, and you will consider yourself no longer bound by it. This opinion is substituted for Formal Opinion No. 409.

We shall now take up your questions in the order given above.

The first three and seventh questions asked by you we must decline to answer for the reason that you would be neither bound nor protected by any answers we might give to them.

Your question No. 4, namely, what fee, if any, may be charged upon the issuance of a commission to a volunteer police officer (a) by the Secretary of the Commonwealth, (b) by the municipality or industry which requests the appointment and commission of such officer, and (c) if a fee is chargeable, by whom shall it be paid, we shall answer.

The Act of July 18, 1917, *supra*, contains no provision relating to any fee to be paid to any person or official by anyone upon the issuance of a commission to a volunteer policeman. Therefore, in the absence of other pertinent and controlling legislation, no fee may be charged.

Section 1 of the Act of June 8, 1923, P. L. 685, as amended May 17, 1933, P. L. 800, 71 P. S. § 803, provides in part:

The fees of the Secretary of the Commonwealth, for the use of the State, shall be as follows:

\* \* \* \* \*

Each commission for railroad, mining, or other police, five dollars.

Volunteer police provided for in the Act of July 18, 1917, are not in the same category as, nor are they, railroad police. Railroad police are expressly created by the Act of February 27, 1865, P. L. 225, 38 P. S. §§ 31-36. The oaths of such police must be recorded by recorders of deeds and filed in the office of the Secretary of the Commonwealth. Commissions of volunteer police need not be recorded nor need they be filed in the office of the Secretary of the Commonwealth. All that the Act of July 18, 1917 requires is that the oaths and commissions of volunteer police be filed in the office of the recorder of deeds. It is not necessary, therefore, to produce revenue under the act wherewith to defray expenses in the office of the Secretary of the Commonwealth because no unusual expenses would be incurred by that office in connection with the act.

The descriptive words "mining police" used in the Act of June 8, 1923, P. L. 685, *supra*, as amended, apparently refer, if they refer to anything, to "Industrial Police" formerly authorized by the Act of April 18, 1929, P. L. 546, 38 P. S. §§ 1-14, for there are no "mining

police" as such. However, said Act of April 18, 1929 was repealed by the Act of June 15, 1935, P. L. 348, and "Industrial Police" no longer exist.

The words "other police," used in the Act of June 8, 1923, *supra*, also probably referred to Industrial Police. This must be true because no commissions are issued by the Governor or through the office of the Secretary of the Commonwealth to any police (excepting volunteer police under the Act of July 18, 1917) other than railroad police.

Railroad police are primarily a peacetime organization. Volunteer police under the Act of July 18, 1917 are a wartime body. They are, in the words of the preamble of the act itself a "volunteer police force to prevent injury and destruction to the various industries of the Commonwealth by enemies of the Nation" "during the time this Nation is at war."

We are not dealing here with the usual type of commission issued; we are not involved with a regularly organized peacetime police force; we are, rather, construing legislation creating a *volunteer* police force during time of national peril and war, such force to be composed of patriotic citizens who *volunteer* their services for the defense of their country and state. To our minds, the General Assembly never contemplated exacting any fee whatever for the issuance of commissions to volunteer policemen. The Act of July 18, 1917 is a grant of necessary power by a grateful Sovereign to those who volunteer in its defense in time of war. It is not a revenue producing statute; it is a war measure for national defense. We conclude, therefore, that no fee may be charged upon the issuance of a commission to a volunteer policeman.

Your question No. 5, namely, shall the recorder of deeds collect and remit to the Commonwealth the sum of fifty cents for each commission received by him and filed in his office under said act, we shall also answer.

Our research discloses certain legislation pertaining to the collection and remission of fees by recorders of deeds to the Commonwealth, on commissions received by such recorders and entered of record by them. Section 5 of the Act of April 11, 1840, P. L. 294, 42 P. S. § 86, provides that commissions of justices of the peace and aldermen shall be entered of record by the recorder of deeds of the proper county. The Act of July 18, 1917, *supra*, does not require that commissions of volunteer police officers be recorded. It simply requires, in section 2 thereof, that the certificates of appointment of such police officers, that is, their commissions, shall be *filed* in the office of the recorder of

of deeds. It follows from this that such commissions are not recorded at all in the office of the recorder of deeds.

Section 55 of the Act of May 2, 1929, P. L. 1278, 16 P. S. § 55, provides that every county officer receiving a commission from the Governor shall deliver the same to the recorder of deeds by whom it shall be recorded at the expense of such officer. This section does not apply to volunteer police officers under the legislation being discussed for the reason that such officers are not county officers.

Section 613 of the Act of April 9, 1929, P. L. 343, 72 P. S. § 613, provides that recorders of deeds shall continue to be the agents of the Commonwealth for the collection of the fees or taxes payable to the Commonwealth upon the recording of deeds, mortgages, and other instruments in writing, and upon *commissions of public officers*, as provided by law. However, there is no law which provides for any fee or tax payable to the Commonwealth upon the commissions of the volunteer police officers now being considered.

Section 6 of the Act of April 6, 1830, P. L. 272, 72 P. S. § 3191, provides that the recorders of deeds of the several counties shall demand and be paid for the use of the Commonwealth certain designated fees upon commissions of expressly enumerated officials, amongst which volunteer police officers are not named.

Section 4 of the Act of April 6, 1830, P. L. 272, supra, 72 P. S. § 3173, provides that recorders of deeds shall demand and receive the sum of fifty cents for every deed, mortgage or other instrument in writing offered to be recorded. As we have said hereinbefore commissions of volunteer police officers are not recorded. Hence section 4 of the act of 1830 does not apply.

It follows from the foregoing that recorders of deeds shall not collect and remit to the Commonwealth any fee whatsoever for the filing of commissions of volunteer police officers.

This question has also been answered heretofore by this department to the same effect as we now answer it. See 1917-18 Op. Atty. Gen. 157.

Your sixth question inquires whether a non-resident of Pennsylvania may be appointed and commissioned as a volunteer police officer.

The Act of July 18, 1917, supra, contains no restriction against a non-resident of Pennsylvania being appointed and commissioned as a volunteer police officer. It follows that a non-resident of Pennsylvania may be so appointed and commissioned.

It is our opinion that:

1. No fee is to be charged upon the issuance of a commission to a volunteer police officer by anyone, nor is any such fee to be paid by anyone;

2. Recorders of Deeds shall not collect nor remit to the Commonwealth the sum of fifty cents or any other sum for any commission of a volunteer police officer received by such recorders for filing in their offices;

3. A non-resident of Pennsylvania may be appointed and commissioned as a volunteer police officer.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 412

*State government—Employes—Benefits for dependents—Necessity for actual dependency—Act of June 7, 1917, as amended.*

Under the Act of June 7, 1917, P. L. 600, as amended by the Act of June 25, 1941, P. L. 207, no person who is designated as a dependent of an applicant may be paid any benefits unless the person so designated was in fact dependent upon the applicant at the time of the latter's enlistment, enrollment, or draft into the military or naval service of the United States.

Harrisburg, Pa., January 22, 1942.

Honorable I. Lamont Hughes, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether an applicant for benefits under the Act of June 7, 1917, P. L. 600, as amended by the Act of June 25, 1941, P. L. 207, 65 P. S. §§ 111-113, is entitled to have the benefits conferred by said legislation paid to persons designated therein who were not dependent upon him in fact at the time of his enlistment, enrollment or draft.

Section 3 of the Act of June 7, 1917, P. L. 600, *supra*, provides in part:

\* \* \* if the person so nominated as a dependent was not, in fact, dependent upon the officer or employe enlisting, en-

rolling, or drafted in the military or naval service or any branch or unit thereof, *at the time of his enlistment, enrollment, or draft, \* \* \** (Italics supplied.)

the head of the department wherein the applicant was employed shall refuse to make any payment to such person on account of the salary or wages of such officer or employee.

The foregoing statutory language is clear and explicit, and it follows therefrom that no benefits can be paid to any person designated as a dependent unless such person was in fact dependent upon the applicant at the time of such applicant's enlistment, enrollment or draft.

We are of opinion, therefore, that no person who is designated as a dependent of an applicant under the Act of June 7, 1917, P. L. 600, as amended, may be paid any benefits under said act unless the person so designated was in fact dependent upon the applicant at the time of such applicant's enlistment, enrollment or draft into the military or naval service of the United States.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 413

*Taxation—Payment under unconstitutional or misinterpreted statute—Limitations on petitions for refund—Fiscal Code of 1929, sec. 305(a), as amended—"Court of final jurisdiction"—Subordinate courts—Statutory Construction Act of 1937, secs. 33 and 52—Entry of judgment against Commonwealth by stipulation of counsel.*

1. The words "court of final jurisdiction" as used in section 503(a)4 of The Fiscal Code of April 9, 1929, P. L. 343, as last amended by the Act of August 5, 1941, P. L. 797, establishing a five-year period of limitations for the filing of a petition for refund of taxes paid under a statutory provision subsequently held unconstitutional or under an interpretation of such provision subsequently held erroneous, are, under sections 33 and 52 of the Statutory Construction Act of May 28, 1937, P. L. 1019, to be construed to mean that court of record, either appellate or subordinate, by which a particular issue has been finally determined in the sense that there is no further action, litigation or appeal with respect to that issue, and not as equivalent to the term "court of last resort."

2. Where in a case involving the constitutionality of interpretation of a statute, judgment is entered against the Commonwealth by stipulation of counsel,

the period of limitations on the filing of a petition for refund of the taxes involved is, under section 503(a) of The Fiscal Code, two years rather than five years.

Harrisburg, Pa., January 26, 1942.

Honorable Ralph L. Walker, Acting Secretary, Board of Finance and Revenue, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to the time within which certain petitions for refund of taxes or other moneys must be filed with the Board of Finance and Revenue under Section 503 of The Fiscal Code of April 9, 1929, P. L. 343, as last amended by the Act of June 6, 1939, P. L. 261, 72 P. S. § 503.

The particular types of refund petitions concerning which you inquire are the following:

(1) Petitions for refund of taxes or moneys paid under an Act of Assembly held by a court of record, other than the United States Supreme Court or the Pennsylvania Supreme Court, either to be unconstitutional or to have been erroneously interpreted.

(2) Petitions for refund of taxes or moneys of the same type as those involved in a court case in which the interpretation or constitutionality of a statute has been contested, and in which judgment against the Commonwealth has been assented to in a stipulation filed by the attorney representing the Commonwealth and approved by the court.

The portion of Section 503 of The Fiscal Code which relates to petitions for refund of the above described types, is clause (a), subdivision (4) thereof, which provides as follows:

The Board of Finance and Revenue shall have the power, and its duty shall be,

(a) To hear and determine any petition for the refund of taxes, license fees, penalties, fines, bonus, or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled, and, upon the allowance of any such petition, to refund such taxes, license fees, penalties, fines, bonus, or other moneys, out of any appropriation or appropriations made for the purpose, or to credit the account of the person, association, corporation, body politic, or public officer entitled to the refund. All such petitions must be filed with the board within two years of the payment of which refund is requested, except

\* \* \* \* \*

(4) When any tax or other money has been paid to the Commonwealth, under a provision of an act of Assembly subsequently *held by the court of final jurisdiction to be*

*unconstitutional, or under an interpretation of such provision subsequently held by such court to be erroneous.* In such case, the petition to the board shall be filed within five years of the payment of which a refund is requested. \* \* \* (Italics ours.)

Clearly, both of the problems involved in this opinion are governed by a few key words in subdivision (4) of the foregoing statutory provisions. The answer to the first question depends upon the type of court intended by the words "the court of final jurisdiction." The answer to the second question depends upon the type of action or ruling contemplated by the legislature when it used the words "held by the court of final jurisdiction."

Turning first to a consideration of the type of court meant by section 503 (4), we find that the phrase "court of final jurisdiction" is not customarily used in designating any particular class of courts. A diligent search has failed to reveal any Pennsylvania cases in which the meaning of this particular phrase has been discussed. Apparently, it has been the position of the board in the past that this phrase is equivalent to "court of last resort," or in other words, that it refers only to the Supreme Court of the United States or the Supreme Court of Pennsylvania.

It is a matter of some difficulty to decide whether this construction by the board is correct. However, we believe it possible to arrive at the legislative intent in this respect by applying established rules of statutory construction. The Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 501, provides, inter alia, the following rules for the construction of statutes:

Section 33. Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; \* \* \*.

\* \* \* \* \*

Section 52. In ascertaining the intention of the Legislature in the enactment of a law the courts may be guided by the following presumptions among others:

(1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable;

(2) That the Legislature intends the entire statute to be effective and certain;

An application of these principles to the statutory provision before us leads us to the conclusion that the legislature did not intend the words "the court of final jurisdiction" to be construed as equivalent to the phrase "court of last resort." This latter phrase has acquired a well understood and generally accepted meaning. In 15 Corpus

Juris 689, the phrase "court of last resort" is defined as "one from which there is no appeal," and this is the meaning generally ascribed to that phrase. Certainly it can be assumed that the legislature was acquainted with the phrase "court of last resort," and that if it had meant to refer only to the United States Supreme Court or the Pennsylvania Supreme Court, in Section 503 (4) of The Fiscal Code, it would have used that phrase. The fact that the legislature was familiar with the phrase "court of last resort" is clearly evidenced in The Statutory Construction Act itself, wherein the following provision appears in Section 52, subdivision (4):

That when a *court of last resort* has construed the language used in a law, the Legislature in subsequent laws on the same subject matter intend the same construction to be placed upon such language; (Italics ours.)

Clearly, therefore, the legislature intended something other than "court of last resort" when it used the phrase "the court of final jurisdiction." Our opinion in this respect is supported by a consideration of the reasons behind the adoption of this section, as well as the practical results of its operation.

There are several sound reasons why the period of limitation for filing petitions for refund should be lengthened from two to five years, when it appears by a court decision that a statute is unconstitutional or has been erroneously construed.

In the first place, such a court decision establishes a definite judicial precedent to guide the board in granting the refund, and there should not be as much reluctance in applying the longer statute of limitations under such circumstances as might be the case where the decision upon the refund claim was solely the responsibility of the board. In the second place, so far as most state taxes are concerned, it is usually more than two years after the taxes are paid before a contest as to the validity of such payments can be carried into court and a decision obtained. Consequently, it was deemed proper to extend the period from two to five years in such cases.

With these considerations in mind, it seems entirely unlikely that the legislature intended to allow the more liberal five-year limitation period only when there has been a ruling by the Pennsylvania Supreme Court or the United States Supreme Court. There is frequently an equal need and justification, for the five-year period where the case has gone no further than a subordinate state or Federal court, for even in such situations more than two years have usually elapsed before judgment is obtained.

Moreover, when litigation involving the interpretation or construction of State tax or revenue statute terminates in a subordinate court, it is almost invariably because the Commonwealth feels the issue was correctly decided, and does not merit an appeal. Accordingly, such a subordinate court ruling would furnish a sound and definite precedent for granting refunds, and for extending the limitation period. In any event, it is only logical to assume that the legislature did not intend to have the application of the two or five-year limitation period determined solely by whether the Commonwealth might elect to appeal from a subordinate court decision construing a revenue-raising statute.

In this connection it is also to be remembered that Section 503 of The Fiscal Code is a remedial statute and, as such, should be liberally construed. In 59 Corpus Juris, page 1107, the following statement appears:

\* \* \* In construing such statutes, regard should be had to the former law, the defects or evils to be cured or abolished, or the mischief to be remedied, and the remedy provided; and they should be interpreted liberally to embrace all cases fairly within their scope, so as to accomplish the object of the legislature, and to effectuate the purposes of the statute by suppressing the mischiefs and advancing the remedy, provided it can be done by reasonable construction in furtherance of the object. \* \* \*

In view of the foregoing considerations, it may logically be accepted that the words "the court of final jurisdiction" were intended to mean that court of record, either appellate or subordinate, by which a particular issue has been finally determined, in the sense that there is no further action, litigation, or appeal, with respect to that issue. This construction of the term "court of final jurisdiction" is supported by the fact that the legislature used the definite article "the" just before it, rather than the indefinite article "a." In thus using the word "the" the legislature evidently intended to designate, not a general type of court, such as a court of last resort, but *the* court which exercised final jurisdiction in the particular case involved.

The word "final" describing the word "jurisdiction" in section 503 (4), was undoubtedly used in the sense ascribed to it in Webster's International Dictionary, 2nd Edition, wherein it is stated "final" means that:

\* \* \* which ends the action or proceeding in the court that makes it, leaving nothing further to be determined by the court, or to be done except the administrative execution of the decision, \* \* \*.

The legislature probably elected to use the word "final" in section 503 (4) because most court rulings, whether inferior or appellate, are

not entirely decisive of the cause until a certain period has elapsed within which counsel may file appeals, petitions for re-argument, petitions for rehearing, etc. Obviously the legislature did not intend the Board of Finance and Revenue to begin granting refunds on the basis of a court decision until it became final, and it accordingly used the phrase "the court of final jurisdiction."

We are convinced, therefore, that the five-year limitation period within which petitions for refunds may be filed for moneys paid under a statute held by a court of final jurisdiction to be unconstitutional or to have been erroneously applied, is available whenever there has been a final ruling by a court of record, whether such court be a subordinate court or a court of last resort.

We now turn to a consideration of your second question, which is whether a stipulation for judgment against the Commonwealth entered into by an attorney representing the taxpayer and the attorney for the Commonwealth, and filed without the approval of the court, may ever be the basis for allowing the five-year period for filing refund petitions.

In the first place, it must be remembered that the words of section 503 (4) are "held by the court of final jurisdiction." This clearly contemplates an express judicial ruling upon the constitutionality or construction of a statute. In order for the ruling to be made the basis of other refunds by the Board of Finance and Revenue, it must obviously contain a statement pointing out the respects in which the statute is unconstitutional or has been erroneously applied. Stipulations for judgment filed in cases involving State revenues almost invariably are little more than computations of the amount due and contain no order of a court or approval of the stipulations by the court. There is no discussion of the constitutionality or construction of the statute involved. Therefore, we do not feel that a case terminated by such a stipulation is one which can properly be made the basis for permitting the five-year limitation period.

An analogy supporting this conclusion might be found in the law of stare decisis. In this respect it is stated in 21 C. J. S., page 383, as follows:

A consent decree cannot be considered a precedent in a later case; nor can a mere concession of counsel be regarded as a judicial establishment of the point conceded.

Similarly, since the five-year limitation period was only intended to be available where there is a court ruling to serve as a precedent, we do not feel that a stipulation of counsel should be considered as equivalent to a court ruling.

It is our opinion: 1. That the words "the court of final jurisdiction" in Section 503 (4) of The Fiscal Code of April 9, 1929, P. L. 343, as last amended by the Act of June 6, 1939, P. L. 261, 72 P. S. § 503, do not mean "court of last resort." Therefore, petitions for refunds of taxes or other moneys may be filed within five years of the payment thereof in any case where such funds have been paid to the Commonwealth under a statute held to be unconstitutional, or to have been erroneously interpreted, by a court of record in a decision or ruling which has become final.

2. That a judgment against the Commonwealth entered by stipulation of counsel in a case involving the constitutionality or interpretation of a revenue statute, is not sufficient to extend the period for filing refund petition from two to five years.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

FRANK A. SINON,  
*Deputy Attorney General.*

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OPINION No. 414

*Milk—Regulation by State and Federal authorities—State—Pennsylvania Milk Control Commission—Pennsylvania Milk Control Law of 1937, as amended—United States Secretary of Agriculture—Agricultural Marketing Agreement Act of 1937 as amended—Minimum prices to producers—Maximum and minimum prices to dealers—Weighing and testing—Trade practices—Bonds—Licenses—Records.*

1. The fixing of minimum prices to be paid by dealers to producers for milk handled in the Philadelphia milk marketing area by the Secretary of Agriculture of the United States pursuant to the Agricultural Marketing Agreement Act of June 3, 1937, Stat. at L. 246, as amended, has suspended the power of the Pennsylvania Milk Control Commission to fix such prices, and has likewise suspended the power of the commission to fix minimum prices to be paid by consumers and others to dealers for such milk, but it does not prevent the exercise by the commission of its power to fix maximum prices to be charged consumers for such milk, nor does it suspend the commission's power to regulate the weighing, sampling, and testing of such milk, or to establish reasonable trade practices and regulate methods of distribution, delivery and sale of milk, such as requiring bottle deposits.

2. The fixing of minimum prices to be paid by dealers to producers for milk handled in the Philadelphia milk marketing area by the Secretary of Agriculture of the United States pursuant to the Agricultural Marketing Agreement Act of June 3, 1937, 50 Stat. at L. 246, as amended, does not relieve milk dealers of the

duty of filing bonds for the protection of milk producers with the Pennsylvania Milk Control Commission, or of obtaining licenses from the commission, or of keeping records and filing them with the commission, all required by the Pennsylvania Milk Control Act of April 28, 1937, P. L. 417, as amended by the Act of July 24, 1941, P. L. 443.

Harrisburg, Pa., April 16, 1942.

Honorable John M. McKee, Chairman, Milk Control Commission,  
Harrisburg, Pennsylvania.

Sir: You have asked us for our opinion concerning the power and authority of the Milk Control Commission in the Philadelphia Milk Marketing Area as the result of Federal price regulation in that area under the Agricultural Marketing Agreement Act of 1937 and its amendments.

You state that during the spring and summer of 1941 the Inter-State Milk Producers Cooperative, Inc., petitioned the Milk Control Commission, under the Milk Control Law, for hearings to increase minimum prices to be paid to producers for milk by dealers. On July 25, 1941, Official General Order No. A-73 of the Commission increased minimum prices to be paid producers. Not satisfied with this increase, the producers demanded a further hearing, which was held October 15, 16, 17 and 18, 1941. They also petitioned the Secretary of Agriculture of the United States for a hearing under the Agricultural Marketing Agreement Act of 1937 and its amendments. After correspondence between the United States Department of Agriculture and the Commission, it was agreed that a joint hearing would be held by the Commission and a hearing officer appointed by the Department of Agriculture. Accordingly, a joint hearing, beginning October 23, 1941, and ending December 5, 1941, was held in Philadelphia to hear testimony on costs and other matters relating to the production and distribution of milk for the Philadelphia Milk Marketing Area. Meanwhile, the Milk Control Commission promulgated and Governor James approved Official General Order No. A-79, which again raised minimum prices to be paid producers for milk. The two increases raised minimum prices to be paid producers for milk used for consumption in fluid form from \$2.98 to \$3.58 per hundredweight. The retail price to consumers for market milk advanced under the two orders from \$0.12 to \$0.14 per quart.

The Milk Control Commission has found from its consideration of the record at the joint hearing that no change in the present order should be made. The United States Secretary of Agriculture has promulgated a tentative order fixing prices to be paid producers for milk handled in the Philadelphia Milk Marketing Area. You state

that this proposed order has been approved by the required number of producers and has been made effective on April 1, 1942. You ask whether this order has limited the powers of the Milk Control Commission in the Philadelphia Area, and if so, to what extent.

Several matters are involved:

- (1) Minimum prices to be paid producers for milk;
- (2) Minimum prices to be charged consumers for milk;
- (3) Maximum prices to be charged consumers for milk;
- (4) Licensing of milk dealers;
- (5) Bonding of milk dealers;
- (6) Record and reports of milk dealers and trade practices.

#### 1. MINIMUM PRICES TO BE PAID PRODUCERS FOR MILK

The order of the Secretary of Agriculture of the United States regulating the handling of milk in the Philadelphia, Pennsylvania, Milk Marketing Area, provides for the payment of minimum prices to producers for milk handled in the Philadelphia Area. Part of this milk originates outside of Pennsylvania. This order has been promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, Act of Congress of June 3, 1937, Chapter 296, as amended by the Act of August 5, 1937, Chapter 567, the Act of April 13, 1938, Chapter 143, and the Act of May 31, 1939, Chapter 157, 7 U. S. C. A. Section 608 et seq. The constitutionality of this act has been sustained by the Supreme Court of the United States. *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); *H. P. Hood & Sons, Inc., v. United States*, 307 U. S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478 (1939).

You have stated that about thirty percent of the milk handled in the Philadelphia Area originates in other states, principally Delaware and Maryland, while the remainder is produced in Pennsylvania. The Federal act authorizes the Secretary of Agriculture to fix minimum prices to be paid producers for milk handled in the current of interstate or foreign commerce or which directly burdens, obstructs or affects interstate or foreign commerce in milk. The power of the Secretary of Agriculture of the United States to regulate the handling of milk in the Philadelphia area includes the power to prescribe minimum prices to be paid producers for milk handled in the Philadelphia area that is produced in Pennsylvania as well as milk coming into that area from other states. *United States v. Wrightwood Dairy Co.*, — U. S. —, 62 S. Ct. 523, 86 L. Ed. — (1942); *United States v. Adler's Creamery*, 107 Fed. (2d) 987 (C. C. A. 2, 1939); *Roloff v.*

Perdue, 33 Fed. Supp. 513 (D. C. Iowa, 1940). The Secretary of Agriculture has apparently exercised that power.

Section 803 of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, as amended by the Act of July 24, 1941, P. L. 443, 31 P. S. § 700j-101 et seq., provides for the fixing, by the Milk Control Commission of minimum prices to be paid producers for milk. So long as the Secretary of Agriculture did not exercise his authority to regulate the prices to be paid producers for milk handled in the Philadelphia Area, the Milk Control Commission had authority to fix those prices. *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939).

The Federal minimum price order supersedes the minimum price order of the Milk Control Commission regulating the same matter, and so long as the Federal order remains in effect the orders of the Milk Control Commission regulating the Philadelphia Area are not enforceable as to minimum prices to be paid producers for milk. *Cloverleaf Butter Co. v. Patterson*, — U. S. —, 62 S. Ct. 491, 86 L. Ed. — (1942). Of course, if the Federal order becomes inoperative the State order will again automatically become operative. *New York Central Railroad Co. v. Public Service Commission of New York*, 268 Fed. 558 (D. C. N. Y., 1920); *Tua v. Carriere*, 117 U. S. 201, 6 S. Ct. 565, 29 L. Ed. 855 (1886); *Butler v. Goreley*, 146 U. S. 303, 13 S. Ct. 84, 36 L. Ed. 981 (1892); *Central Pacific R. Co. v. Nevada*, 162 U. S. 512, 16 S. Ct. 885, 40 L. Ed. 1057 (1896); *Public Service Commission v. New York Central R. Co.*, 230 N. Y. 149, 129 N. E. 454 (1920).

## 2. MINIMUM PRICES TO BE PAID TO MILK DEALERS BY CONSUMERS AND OTHERS FOR MILK

It is a closer question as to whether the Milk Control Commission retains power to fix minimum prices to be paid by consumers and others to dealers for milk. The Agricultural Marketing Agreement Act of 1937, as amended, does not provide for the fixing of wholesale or retail prices for milk. The question then is whether the fixing of minimum wholesale and retail prices is so closely integrated with and a part of fixing prices to be paid producers as to also be superseded by Federal regulation. To answer that question we must consider the provisions of the Milk Control Law of April 28, 1937, P. L. 417, as amended by the Act of July 24, 1941, P. L. 443. The preamble

to that act set forth that milk is the most necessary human food and that consumers "are not assured of a constant and sufficient supply of pure and wholesome milk unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk."

Section 801 of the Milk Control Law, as amended, provides that the Milk Control Commission "shall ascertain and maintain such prices for milk in the respective milk marketing areas as will be most beneficial to the public interests, best protect the milk industry of the Commonwealth, and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein." In fixing prices, the Milk Control Commission "shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer, which return shall not be less than the cost of production and a reasonable profit to the producer, and a reasonable return to the milk dealer or handler."

Section 802 provides that the Milk Control Commission shall fix minimum wholesale and retail prices for milk. It also provides that the Milk Control Commission may fix minimum prices for certain milk products and may fix maximum wholesale and retail prices for milk.

Section 803 provides that the Milk Control Commission shall fix "the minimum prices to be paid by milk dealers or handlers to producers for milk sold or delivered or made available on consignment or otherwise by producers to dealers or handlers." The fixing of prices to be paid by milk dealers or handlers to producers for milk to be used solely in manufacturing milk products is made discretionary with the Milk Control Commission.

It will thus be seen that the purpose of the Milk Control Law is primarily to assure the consuming public of sufficient milk at all times. Continuous production of milk is to be assured by fixing minimum prices to be paid producers for milk. The fixing of minimum prices to be charged by milk dealers is necessarily dependent upon the amount to be paid producers. To the minimum price to be paid producers is to be added sufficient to pay the cost of distributing milk and to afford a reasonable return to milk dealers. See *Commonwealth v. Licini*, 138 Pa. Superior Ct. 277, 10 A. (2d) 923 (1940).

In the present case, the Milk Control Commission has not found it necessary to provide as high minimum prices as the Secretary of

Agriculture of the United States in order to maintain an adequate supply of pure and wholesome milk. The Secretary of Agriculture feels that higher prices are necessary. The Milk Control Commission believes that the fixing of higher prices instead of returning more to producers will cause many milk dealers to do business in such a way as to avoid paying these prices, as, for example, by purchasing western cream and refusing to take milk from local producers. If the Milk Control Commission were to fix resale prices it would have to fix them on the minimum prices that it found necessary for producers. This would establish a lower schedule of retail and wholesale prices than will be necessary to pay producers the minimum prices fixed by the Secretary of Agriculture. In such case, orders of the Milk Control Commission would tend either to provide dealers with less than sufficient margin on which to operate or to interfere with the amount producers would receive. The result would be a tendency to cause lower returns to producers on some classes of milk. This would be direct interference with the authority exercised by the Secretary of Agriculture of the United States. Such interference, as pointed out above, cannot constitutionally exist. The State power must yield to the Federal power as long as the Federal power is exercised. *Clover-leaf Butter Co. v. Patterson*, — U. S. —, 62 S. Ct. 491, 86 L. Ed. — (1942).

We are not unmindful of the provisions of the Milk Control Law and the Agricultural Marketing Agreement Act that enable joint action by both State and Federal authorities.

Section 10 (i) of the Agricultural Marketing Agreement Act, as amended, 7 U. S. C. A. Section 610 (i) provides:

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture . . .

Section 311 of the Milk Control Law, as amended, 31 P. S. § 700j-311, provides:

The Commission is hereby vested with authority to confer with legally constituted authorities of other states and of the United States with respect to uniform milk control within the states and as between states. The Commission is authorized to join with such authorities of other states and with the authorities of the United States to conduct joint investigations, to exchange information, hold joint hearings and issue joint, complementary or concurrent orders, and to enter into a compact or compacts for such uniform milk control, subject to such Federal approval as may be authorized or required by law.

These provisions indicate that if the State and Federal authorities, as the result of joint action, reach the same conclusion as to minimum prices to be paid producers, an order of the Milk Control Commission fixing wholesale and retail prices of milk would stand. Congress has manifested its assent to a State order fixing minimum retail and wholesale prices of milk made on the basis of the minimum prices to be paid producers determined by the Secretary of Agriculture and concurred in by the State authority. Having shown its assent to this extent, it is clear that Congress intended that Federal regulation should extend no further. The provision of Section 10 (i) of the Agricultural Marketing Agreement Act, as amended, would have little meaning otherwise. As has been pointed out above, when Congress regulates minimum prices for milk distributed in a market part of which is obtained through interstate commerce, the order applies to all the milk distributed in that market, whether it moves in interstate commerce or not. A concurrent State order as to minimum prices to be paid producers for milk distributed in that market would be meaningless. *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); *United States v. Wrightwood Dairy Co.*, — U. S. —, 62 S. Ct. 523, 86 L. Ed. — (1942). An order fixing minimum wholesale and retail prices would not be meaningless, however, but would be complementary to the Federal order.

The failure of the Milk Control Commission and the Secretary of Agriculture to arrive at the same conclusions may mean that "the hopes for a coordinated and integrated dual system would not materialize" (*Buckstaff Bath House Co. v. McKinley*, 308 U. S. 358, 364, 60 S. Ct. 279, 282 (1931)), but it does not affect the supremacy of the Federal order over any conflicting provisions of a State order.

### 3. MAXIMUM PRICES TO BE CHARGED CONSUMERS AND OTHERS FOR MILK BY MILK DEALERS

The Milk Control Law not only provides for a constant supply of pure and wholesome milk during periods of economic stress by providing minimum prices necessary to assure constant production and distribution of milk, but also provides protection of the public against exorbitant charges by milk dealers. In fixing minimum prices, the primary consideration is what is the least cost to produce milk and get it to the consumer. In fixing maximum prices the primary consideration is whether, assuming that certain prices must be paid producers for milk and certain necessary costs exist to distribute the milk, the public is paying more than a reasonable amount for the milk. In determining maximum prices, the Milk Control Commission must accept the amount being paid to producers as a reasonable cost of the milk dealer's operation. It must also accept all other reasonable costs not manipulated by the dealers as a necessary cost of operation.

Granting those costs, the Milk Control Commission must then determine whether the amount that the public is paying is so excessive over reasonable costs as to require the establishment of a ceiling on prices. This does not interfere with the administration of the Federal act. The Federal act does not touch upon maximum prices.

It has uniformly been held that where Congress has not occupied an entire field of regulation of interstate commerce, that is local in character, the states retain power to regulate the part of the field not occupied. *Missouri, Kansas & Texas Railway v. Haber*, 169 U. S. 613, 18 S. Ct. 488, 42 L. Ed. 878 (1898); *Reid v. Colorado*, 187 U. S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (1902); *Savage v. Jones*, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182 (1912); *Townsend v. Yeomans*, 301 U. S. 441, 57 S. Ct. 842, 81 L. Ed. 1210 (1937); *Kelly v. Washington*, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3 (1937).

The minimum price established by the Federal Government must necessarily be considered by the Milk Control Commission in establishing maximum prices, although the Commission if it were establishing minimum prices to be paid producers would not establish the same minimum price.

### 4. WEIGHING AND TESTING

The preamble to the Milk Control Law sets forth the fact that the utilization method of paying for milk generally prevails throughout the milk industry in Pennsylvania and makes it difficult for producers to know whether they are being paid properly for their milk. Milk is paid for according to the weight and butterfat test of the milk,

Under Article VI of the Milk Control Law, as amended, elaborate provisions are made for protecting milk producers against milk dealers who make payment on the basis of erroneous weights and butterfat tests. Milk dealers are required to obtain a permit from the Milk Control Commission for each place of weighing or measuring milk. The testing of milk for butterfat must be conducted by a tester certified by the Milk Control Commission. Samples taken for testing purposes must be taken by testers or weighers and samplers certified by the Milk Control Commission. The Milk Control Commission may decline to grant or may suspend or revoke a weighing or measuring permit, a tester's certificate or a weighing and sampling certificate for improper sampling, weighing or testing. The method of sampling and testing milk is set forth in detail.

Article VI of the Milk Control Law, as amended, also directs the Milk Control Commission to make check tests and other reasonable tests whenever in its judgment such tests are advisable for the public welfare. Milk dealers are required to furnish producers with written statements showing the amount of milk delivered daily and the average butterfat test of the milk for the period for which payment is made.

These provisions are derived from the Act of May 6, 1925, P. L. 541, which formerly had placed these powers in the Department of Agriculture of Pennsylvania. These provisions are designed to protect milk producers against fraud, imposition or mistake on the part of dealers in paying producers for milk. They are separable from the price-fixing provisions of the Milk Control Law and likewise are separable from the price-fixing order of the Secretary of Agriculture. The Milk Control Commission retains power to enforce Article VI of the Milk Control Law, as amended, even though agents of the United States Department of Agriculture may duplicate some of the testing carried on by the Milk Control Commission. *Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 56 S. Ct. 685, 80 L. Ed. 1099 (1936); *Moulton v. Williams Fruit Corp.*, 70 Cal. App. 776, 14 P. (2d) 88 (1932), affirmed in 218 Cal. 106, 21 P. (2d) 936 (1933).

## 5. BONDS OF MILK DEALERS

Article V of the Milk Control Law, as amended, requires milk dealers to file bonds with the Milk Control Commission for the protection of milk producers. Section 501 of the Milk Control Law, as amended, provides that these bonds "shall be upon a form prescribed by the Commission, conditioned for the payment by the milk dealer or handler of all amounts due, including amounts due under this act and the orders of the Milk Control Commission, for milk purchased or otherwise acquired from producers by the milk dealer or handler

during the license year upon such terms and conditions as the Milk Control Commission may prescribe."

Like the weighing, sampling and testing of milk the bonding of milk dealers is a protection to producers of milk not necessarily related to price-fixing. While the bond protects the payment of minimum prices fixed in orders of the Milk Control Commission, the condition is not limited to that. The bonding provisions of the Milk Control Law are broad enough to protect producers whether the price be fixed by contract between the producer and dealer, by an order of the Milk Control Commission, or by an order of another authority having jurisdiction to fix such prices. The bonding provisions of the Milk Control Law do not interfere with the powers exercised by the Secretary of Agriculture under the Agricultural Marketing Agreement Act. *Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 56 S. Ct. 685, 80 L. Ed. 1099 (1936); *Moulton v. Williams Fruit Corp.*, 70 Cal. App. 776, 14 P. (2d) 88 (1932), affirmed in 218 Cal. 106, 21 P. (2d) 936 (1933).

The bonding provisions of the Milk Control Law have been upheld as a protection against the danger of fraud to producers and consumers, as well as a reasonable provision to assure an adequate supply of pure and wholesome milk to the public. *Harrisburg Dairies, Inc., v. Eisaman*, 338 Pa. 58, 62, 11 A. (2d) 875 (1940), *Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 1 A. (2d) 775 (1938); *Commonwealth v. Licini*, 138 Pa. Superior Ct. 277, 10 A. (2d) 923 (1940). Federal price-fixing is not a substitute for the financial security provided by these bonds.

## 6. LICENSING OF MILK DEALERS

Article IV of the Milk Control Law, as amended, requires milk dealers to be licensed by the Milk Control Commission. Any buying, selling or distribution of milk in Pennsylvania, with certain limited exceptions, must be conducted by a licensed milk dealer. While some of the milk may be purchased by transactions in interstate commerce, most of the equipment of a milk dealer required to be licensed is local in character and does not involve interstate commerce. See *Seelig v. Baldwin*, 7 Fed. Supplement 776 (C. C. N. Y. 1934), affirmed in 293 U. S. 523 (1935).

The licensing of milk dealers engaged in interstate commerce is within the powers of a state in the absence of like regulation by Congress: *California v. Thompson*, 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219 (1941); *Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 56 S. Ct. 685, 80 L. Ed. 1099 (1936).

In order to obtain a license the milk dealer must show the Commission his financial condition and set forth facts that show adequate technical personnel and facilities properly to conduct the business of receiving and handling milk. The licensing of milk dealers is a protection to the public in assuring that only milk dealers able to furnish competent and adequate distribution of milk will be allowed to operate. These provisions are a protection to producers who must depend upon the milk dealers to pay them for their product and to other milk dealers who would be subject to unfair competition and ruthless trade practices by the financially irresponsible. While the Milk Control Commission will not carry on its minimum price-fixing activities in the Philadelphia markets, its other activities will be carried on.

Since the cost of administering the Milk Control Law is only partially met by license fees and the remaining cost (about 50%) is paid out of the General Fund, the schedule of license fees set forth in Sections 408, 409 and 410 of the Milk Control Law must remain in effect. *Rock v. Philadelphia*, 328 Pa. 382, 196 A. 59, 114 A. L. R. 567 (1938), affirming 127 Pa. Superior Ct. 143, 191 A. 669 (1937).

#### 7. RECORDS, REPORTS, INFORMATION AND TRADE PRACTICES

Article VII of the Milk Control Law, as amended, requires milk dealers subject to license to keep full records of their activities within the Commonwealth. In addition they are required to file reports with the Milk Control Commission in order to enable the Milk Control Commission to perform its functions. These records and reports are necessary to enable the Milk Control Commission to check on the amounts owing producers for milk and to assure the sustained operation of the milk industry throughout the State. These records and reports while relevant to minimum prices to be paid producers or consumers are not limited to such matters. They are relevant to determine whether the Milk Control Commission should fix maximum prices and whether milk dealers are engaging in such activities as the Milk Control Commission is empowered or directed to regulate. The existence of a Federal minimum price order in the Philadelphia market does not relieve the dealer operating in that market from continuing to keep the records required by the Milk Control Law and filing the reports required to be filed with the Milk Control Commission. *Champion Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062 (1932); *Natural Gas Pipeline Co. of America v. Slattery*, 302 U. S. 300, 58 S. Ct. 199, 82 L. Ed. 276 (1937); *Independent Gin & Warehouse Co. v. Dunwoody*, 40 F. (2d) 1 (C. C. A. 5, 1930).

Section 301 of the Milk Control Law, as amended, provides that the Milk Control Commission shall regulate the entire milk industry in Pennsylvania. The Milk Control Commission is empowered to establish reasonable trade practices, systems of production control and marketing area committees. These are matters local in nature with which the Federal Government is not concerned under its price-fixing order. You have asked whether the Milk Control Commission still has authority under its power to regulate the distribution, delivery and sale of milk and the establishment of reasonable trade practices to issue an order prescribing a bottle deposit by consumers to milk dealers to assure the return of bottles after use by the consumers. The establishment of a bottle deposit is a reasonable regulation to prevent the wanton destruction and careless loss of milk bottles. This will not interfere with prices paid for milk and is a reasonable measure for the protection of the milk industry in the Philadelphia market. It has no tendency to interfere with the Federal order. See *Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California*, 283 U. S. 380, 51 S. Ct. 553, 75 L. Ed. 1128 (1931).

It is, therefore, our opinion that:

1. The fixing of minimum prices to be paid producers for milk by the Secretary of Agriculture of the United States has suspended the power of the Milk Control Commission to fix minimum prices to be paid producers by dealers for milk handled in the Philadelphia Milk Marketing Area.

2. The fixing of minimum prices to be paid producers for milk by the Secretary of Agriculture of the United States has suspended the power of the Milk Control Commission to fix minimum prices to be paid by consumers and others to milk dealers for milk.

3. The order of the Secretary of Agriculture of the United States fixing minimum prices to be paid producers for milk does not prevent the exercise by the Milk Control Commission of its power to fix maximum prices to be charged consumers for milk in the Philadelphia Milk Marketing Area.

4. The establishment of a Federal order fixing minimum prices to be paid producers for milk handled in the Philadelphia Milk Marketing Area does not suspend the powers and duties of the Milk Control Commission to assure honest and accurate weighing, sampling and testing of milk handled in the Philadelphia Milk Marketing Area.

5. The establishment of a Federal order fixing minimum prices to be paid producers for milk handled in the Philadelphia Milk Market-

ing Area does not relieve milk dealers of the duty of filing with the Milk Control Commission bonds for the protection of milk producers.

6. The establishment of a Federal order fixing minimum prices to be paid producers for milk handled in the Philadelphia Milk Marketing Area does not relieve milk dealers from the necessity of obtaining licenses from the Milk Control Commission to conduct the business of selling, distributing or manufacturing milk in the Philadelphia Milk Marketing Area.

7. The establishment of a Federal order fixing minimum prices to be paid producers for milk handled in the Philadelphia Milk Marketing Area does not relieve milk dealers from keeping the records or filing with the Milk Control Commission the reports required to be filed by the Milk Control Law, as amended.

8. The establishment of a Federal order fixing minimum prices to be paid producers for milk handled in the Philadelphia Milk Marketing Area does not take away from the Milk Control Commission its power to establish reasonable trade practices and regulate methods of distribution, delivery and sale of milk, such as the requiring of bottle deposits to be paid by consumers to assure the return of bottles to milk dealers.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

FRANK E. COHO,  
*Deputy Attorney General.*

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OPINION No. 415

*Incompetents—Removal to State institution—Liability for costs—Commonwealth—Mental Health Act of 1923, sec. 501, as amended—Source of payment—General Appropriation Act of 1941.*

1. The costs of admission or commitment, including the expenses of removal, to any mental hospital of a patient who is mentally ill, mentally defective, epileptic, or inebriate, are chargeable to the estate of such patient or to the person liable for his support, provided that if such estate or person is unable to pay the same the Commonwealth, and not the county or poor district, is liable for such costs, in accordance with the provision of section 501 of The Mental Health Act of July 11, 1923, P. L. 998, as amended by the Act of October 11, 1938, P. L. 63.

2. Such costs of admission or commitment, including the expenses of removal, of a patient to a mental hospital as are chargeable against the Commonwealth

under section 501 of The Mental Health Act of July 11, 1923, as amended, are payable out of moneys appropriated under The General Appropriation Act of June 20, 1941, no. 12-A, to provide for the payment of all expenses of maintenance and operation necessary for the proper conduct of the work of the institutions established for the care and treatment of the insane.

Harrisburg, Pa., April 22, 1942.

Honorable E. Arthur Sweeney, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: We have your request for advice concerning the costs of commitment of mental patients and their transportation to State institutions under the provisions of the Act of October 11, 1938, Special Session, P. L. 63, 50 P. S. § 141.

You call our attention to the fact that formerly these costs were borne by the county or poor district. In substance, you inquire how these costs shall hereafter be paid.

Your request involves a consideration of certain provisions of the Mental Health Act, the Act of 1923, P. L. 998, 50 P. S. § 1, et seq., as amended.

Section 501 of said act, as last amended by the Act of October 11, 1938, P. L. 63, reads in part as follows:

Whenever any patient who is mentally ill, mentally defective, epileptic, or inebriate is admitted to any mental hospital whether by order of a court or judge, or in any other manner authorized by the provisions of this act, *the cost of such admission or commitment shall be deemed to include the expenses of removing such patient to the hospital*, the fees of physicians or commissioners, and all other necessary expenses however incurred. Such costs shall be chargeable to the estate of such patient, or to the person liable for his support: Provided, That if such estate or person is unable to pay the same, *the Commonwealth shall be liable for such costs.* (Italics supplied.)

This amendatory Act of 1938, P. L. 63, supra, became effective June 1, 1939, but the act was subsequently amended by the Act of May 25, 1939, P. L. 195, 50 P. S. § 21, so as to become effective June 1, 1941.

Section 501, as amended, is in harmony with section 503 of the Mental Health Act, supra, as amended by the Act of 1938, P. L. 63, supra, 50 P. S. § 143, which places the liability for the costs of care and maintenance, including clothing, in such cases, upon the Commonwealth, and reads in part as follows:

Whenever any mental patient is admitted, \* \* \* to any mental hospital maintained wholly or in part by the Com-

monwealth, *the cost of care and maintenance, including clothing, of such patient \* \* \** if he is financially unable to pay such expenses or any proportion thereof, then such expenses or the proportion thereof which cannot be collected from the patient, or the person liable for his support, *shall be paid by the Commonwealth.* (Italics supplied.)

Section 503, *supra*, was construed in Formal Opinion No. 403, of the Department of Justice, dated November 21, 1941, addressed to Honorable E. Arthur Sweeny, Secretary of Welfare of the Commonwealth of Pennsylvania, in which the following conclusion was reached:

We are of the opinion, therefore, and you are accordingly advised that the costs of the care and maintenance of a mental patient in any mental hospital maintained wholly or in part by the Commonwealth, must be defrayed from the real or personal property of such patient. If he is financially unable to pay such expenses or any proportion thereof, then such expenses or the proportion thereof which cannot be collected from the patient, or the person liable for his support, shall be paid by the Commonwealth.

The foregoing amendatory legislation is also in accord with the theory of State-wide care and maintenance for mental patients, as stated in the preamble to the act of 1938 which transferred the mental institutions to the Commonwealth, the Act of 1938, P. L. 53, 50 P. S. § 1051 et seq., which is, in part, as follows:

Experience has proven that the care and maintenance of indigent mentally ill persons, mental defectives and epileptics should be *centralized in the State Government* in order to insure their proper and uniform care, maintenance, custody, safety and welfare. (Italics supplied.)

Therefore, we have little difficulty in reaching the conclusion that, under the circumstances hereinbefore set forth, the Commonwealth is liable for the costs in question.

Your request raises the further question as to the appropriation out of which such expenses are to be paid. With reference to this question, you call our attention to the fact that the only sources of funds which might be used for this purpose are the maintenance appropriations of the mental hospitals to which such patients might be committed or the appropriation to the Department of Welfare for salaries and general expenses.

The appropriation for salaries and general expenses of the Department of Welfare is contained in Appropriation Act No. 12-A, approved June 20, 1941, The General Appropriation Act of 1941, wherein it is provided, p. 33, *inter alia*, as follows:

## TO THE DEPARTMENT OF WELFARE

\* \* \* For the payment of salaries, wages or other compensation of a deputy secretary and other employes; for the payment of general expenses, supplies, printing and equipment necessary for the proper conduct of the work of the department, \* \* \* (\$392,000).

It must be obvious that the costs of admission or commitment of mental patients and their transportation to State institutions cannot be embraced in the foregoing appropriation.

The other appropriation suggested as available for the purpose is that which includes, among other items, the expenses of maintenance and operation of institutions for the care and treatment of the insane.

This appropriation is also included in Appropriation Act No. 12-A, supra, and is in part as follows:

\* \* \* for the payment of general expenses, supplies and printing; for repairs, alterations and improvements to plant and equipment; for improvements to land; for the purchase of equipment, furniture, furnishings and live stock; for expenses of the boards of trustees and incidental expenses, and for all other expenses of maintenance and operation necessary for the proper conduct of the work of the Allentown State Hospital \* \* \* and any other institution established for the care and treatment of the insane as may be authorized and approved by the Secretary of Welfare, the sum of twenty-two million eight hundred fifty thousand dollars (\$22,850,000).

It will be noticed that the appropriation covers "all other expenses of maintenance and operation necessary for the proper conduct of the work of the" institutions for the insane.

This language has raised a doubt as to whether the cost of the admission or commitment of a mental patient and the expenses of removing such patient to the hospital and all other necessary expenses may be considered as expenses of maintenance and operation necessary for the property conduct of the work of the institutions for the insane.

However, we are informed that among expenses of maintenance and operation of such institutions are usually included such costs as the operation of health clinics outside the mental institutions and the expenses of social services performed also outside the institutions in connection with mental patients while on parole.

It is logical to conclude that the expenses incident to the admission, commitment and transportation of mental patients is an expense of

maintenance and operation necessary for the proper conduct of the work of the institutions for the insane.

It must be presumed that the legislature intended Appropriation Act No. 12-A, supra, to include these costs of admission or commitment and transportation of mental patients enumerated in section 501, as amended, supra, since the act itself carries no express appropriation for the payment of these expenses.

We are of the opinion that:

1. The costs of admission or commitment including the expenses of removal to any mental hospital of a patient who is mentally ill, mentally defective, epileptic, or inebriate, shall be chargeable to the estate of such patient or to the person liable for his support, provided, that if such estate or person is unable to pay the same, the Commonwealth and not the county or poor district shall be liable for such costs, in accordance with the provisions of section 501 of the Mental Health Act as amended; and

2. Such costs are payable out of moneys appropriated under Appropriation Act No. 12-A, The General Appropriation Act of 1941, to provide for the payment of all expenses of maintenance and operation necessary for the proper conduct of the work of the institutions established for the care and treatment of the insane.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

H. J. WOODWARD,  
*Deputy Attorney General.*

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OPINION No. 416

*School Districts of the Fourth Class—Minimum Salary Law—Reimbursement Requirements—Computation—Act of August 5, 1941, P. L. 783.*

The amount of reimbursement to be made by the Commonwealth is to be determined by using the reimbursements made in 1940-41, and adding thereto the amount of mandated increase in salary in all cases in which there is any increase.

Such school districts will continue to receive the same reimbursement that they received in 1940-41, inasmuch as the percentage of basic reimbursement is not determined on the basis of a new minimum salary requirement, but on the basis of the required salary for the year 1940-41.

Harrisburg, Pa., April 28, 1942.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: You have requested us to interpret the provisions of the Act of August 5, 1941, P. L. 783, 24 P.S. § 1164, more commonly known as the Minimum Salary Law for Teachers of School Districts of the Fourth Class, in order that your department may properly compute the reimbursement requirements in this act.

You inform us that there is an ambiguity as to the meaning of those provisions of this act which are contained in the following questions which you propound to us.

1. Is the amount of reimbursement to be made by the Commonwealth to be computed by applying the schedule of Clause 19 of Section 1210 and then making an adjustment to compensate for the increased salary, as compared to the year 1940-41, or is it to be determined by using the amount of reimbursement made in 1940-41 and adding thereto the amount of mandated increase in salary in all cases in which there is any increase?

2. What happens in those cases in which high school teachers, under the original act, were employed for terms longer than nine months and were, therefore, already receiving \$1,200 or more? For instance, under legislation prior to the enactment of Act 288 when a district employed a high school teacher for ten months it paid a minimum salary of \$1,300 and received from the Commonwealth reimbursement based on that minimum. Under the new law there is an annual minimum of \$1,200 regardless of the number of months.

A specific example of such situations may be presented as follows: District A is a district in which the total true valuation per teacher is not more than \$50,000 and is, therefore, for reimbursement purposes a 75% district. It maintained for 1940-41 a ten-month high school term, and therefore, the minimum salary under the old law was \$1,300. The district was entitled to receive as reimbursement from the State 75% of this amount or \$975. How much reimbursement would this district be entitled to receive for the school year 1941-42 under the provisions of the new Act which establishes a minimum annual salary of \$1,200?

The General Assembly in passing the Act of August 5, 1941, *supra*, amended Clause 7, Section 1210 of the School Code so that it now reads as follows:

Seven. Districts of the fourth class.—Elementary teachers, minimum annual salary one thousand dollars (\$1,000), minimum annual increment fifty dollars (\$50), minimum number of increments two (2); high school teachers, minimum

annual salary of one thousand two hundred dollars (\$1,200), minimum annual increment fifty dollars (\$50), minimum number of increments two (2). The first increments provided for hereby shall apply for the school year one thousand nine hundred forty-two, one thousand nine hundred forty-three.

*In addition to the payments now required by law to be made by the Commonwealth to school districts of the fourth class on account of salaries of members of the teaching staff, the Commonwealth shall pay for each elementary and high school teacher the full amount of the excess prescribed by these amendments over the minimum salary theretofore required by law on the basis of the length of the school term maintained in the district during the school year one thousand nine hundred forty,—one thousand nine hundred forty-one.*

Provided, That the salaries of teachers employed under contract prior to the effective date of these amendments at annual salaries greater than the minimum salaries hereby prescribed shall in no case be decreased through the operation of these amendments. \* \* \* (Italics ours.)

It is obvious from a study of these provisions that it was the intent of the legislature to do two things: First, to increase the minimum salary prescribed for teachers employed in fourth class school districts; and, second, to reimburse the school districts *in full* for any of the increases provided for in this act over the minimum salary in effect in fourth class school districts during the school year 1940-41. That is to say that the "excess" to be paid by the Commonwealth represents the difference between the new minimum and the old minimum of fourth class school districts in 1941.

Stated in another way, it may be said that the intent of the General Assembly with regard to reimbursements under the provisions of this act may be briefly said to be that each district, in addition to the amount which it would regularly receive under the plan of reimbursement operative for the school year 1940-41, shall receive such extra reimbursement as represents the *additional cost under the new minimum salary schedule*.

It is apparent that the only portion of the Act of August 5, 1941, supra, which presents any special difficulty of interpretation is the paragraph which reads:

In addition to the payments now required by law to be made by the Commonwealth to school districts of the fourth class on account of salaries of members of the teaching staff, the Commonwealth shall pay for each elementary and high school teacher the full amount of the excess prescribed by these amendments over the minimum salary theretofore required by law on the basis of the length of the school term

maintained in the district during the school year one thousand nine hundred forty,—one thousand nine hundred forty-one.

Obviously, in applying the provisions of this paragraph when computing the amount of State subsidy on the salary of any teacher in a district of the fourth class, it is essential to determine the total amount the district was required to pay for the school year 1940-41 on the basis of the number of months of school in the district for that year. If that amount was less than the minimum required under the act, the difference constitutes an excess which the Commonwealth is required to bear. If that amount equalled or exceeded the amount required by the provisions of the Act of August 5, 1941, *supra*, then there is no excess in this respect.

The provisions of this paragraph of the Act of August 5, 1941, *supra*, require that the reimbursements from the Commonwealth shall consist of the "full amount of the excess in addition to the payments now required by law."

The next step is therefore, clear, namely, to determine what contribution of payment the Commonwealth was required to pay for 1940-41 under the provisions of the law before it was amended by the Act of August 5, 1941, P. L. 783, *supra*.

Prior to the enactment of the Act of 1941, *supra*, the minimum salary established for teachers in districts of the fourth class was a monthly rate and not an annual rate. In view of the fact that the minimum length of the school term heretofore required was only 160 days in the elementary school and 180 days in the high school, there were districts in which the number of months that elementary teachers were paid ranged from eight to ten months and the number of months for which high school teachers were employed ranged from nine months to ten months. The minimum monthly salary for elementary teachers was \$100 and the minimum monthly salary for high school teachers was \$130, and consequently the minimum annual salary ranged from \$800 to \$1,000 for elementary teachers and from \$1,170 to \$1,300 for high school teachers.

These facts just mentioned are of great importance in reaching a conclusion as to what additional payments really are required by the Act of 1941. In addition, they are of importance in an interpretation of Clause 19 of Section 1210 of the School Code which prescribes the percentage of regular salary which the Commonwealth is obliged to reimburse to the various school districts.

Clause 19 of Section 1210 of the School Code reads in part as follows:

19. Of the salaries herein provided for full-time teachers, supervisors, principals and all other full-time members of the teaching and supervisory staff in the public schools of the Commonwealth, the Commonwealth shall pay for the biennium year beginning June first, one thousand nine hundred and twenty-three, and each biennium year thereafter, to such school districts as comply with the laws governing the public schools of the Commonwealth, for the payment of the salaries of each of said persons employed therein, as shown by the certificate herein required to be filed with the Superintendent of Public Instruction in the November immediately preceding any such biennium year, as follows: \* \* \* in school districts of the fourth class, for each member of the teaching and supervisory staff, fifty per centum (50%) of the annual minimum salary prescribed herein for teachers in such districts: \* \* \*.

Provision is also made in clause 19 for reimbursement on the basis of sixty per centum (60%) in all districts having a true valuation of more than \$50,000, and not more than \$100,000, per teacher, and for reimbursement on the basis of seventy-five per centum (75%) in all districts having a true valuation for a teacher of not more than \$50,000. In addition, this section also sets up the method of determining the true valuation per teacher.

In our opinion the provisions of clause 19, supra, were not altered by the amendment of clause 7 by the Act of 1941 supra, but the method of applying the provisions of clause 19 has been explained in the words contained in paragraph two of clause 7 which requires that the reimbursement is to be for the full amount of the "excess" of salary on

\* \* \* the basis of the length of the school term maintained in the district during the school year one thousand nine hundred forty,—one thousand nine hundred forty-one. \* \* \*

The percentage of basic reimbursement, therefore, is not determined on the basis of a new minimum salary requirement, but on the basis of the required salary for the year 1940-41.

By way of further explanation we believe that a simple method of computing the amount due in each instance is as follows:

#### I. Salaries of Elementary Teachers

- Step 1. Multiply the number of months actually taught in the district for the school year 1940-1941 by the minimum monthly rate of salary then required by law, namely, \$100 per month.

- Step 2. If the amount obtained by Step 1 is less than the new minimum annual salary required, namely, \$1,000, subtract it from \$1,000 and multiply the difference thus obtained by the number of teachers for which reimbursement is being computed.
- Step 3. Compute the amount of reimbursement due the district from the Commonwealth on the salary paid in 1940-1941 under the provisions of Clause 19 of Section 1210 of the School Code.
- Step 4. Add together the results of Step 2 and Step 3, which will give the total sum to be reimbursed.

## II. Salaries of Secondary Teachers

- Step 1. Multiply the number of months actually taught in the district for the school year 1940-1941 by the minimum monthly rate of salary then required by law, namely, \$130 per month.
- Step 2. If the amount obtained by Step 1 is less than the new minimum annual salary required, namely, \$1,200, subtract it from \$1,200 and multiply the difference thus obtained by the number of teachers for which reimbursement is being computed.
- Step 3. Compute under the provisions of Clause 19 of Section 1210 of the School Code the amount of reimbursement due the district from the Commonwealth on the salary required by law for the number of months taught in 1940-1941.
- Step 4. Add together the results of Step 2 and Step 3, which will give the total sum to be reimbursed.

For both elementary and high school after the first year, there will be added to the amount determined as above, the total of any mandatory increments accruing under the revised provisions of clause 7, section 1210.

In view of the foregoing, the answer to your first question is that the amount of reimbursement to be made by the Commonwealth is to be determined by using the amount of reimbursements made in 1940-41, and adding thereto the amount of mandated increase in salary in all cases in which there is any increase.

The answer to your second question is that such school districts will continue to receive the same reimbursement that they received in 1940-41, inasmuch as the percentage of basic reimbursement is not

determined on the basis of a new minimum salary requirement, but on the basis of the required salary for the year 1940-41.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

GEORGE J. BARCO,  
*Deputy Attorney General.*

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OPINION No. 417

*Veterans' Commission—Gratuities for children between the ages of 16 and 21 years—Act of July 28, 1941, Act No. 43-A.*

In view of the fact that the recipients of these gratuities will receive the full course of instruction in three years which they would have received in four years under the prior practice, and further that the cost remains the same, the Veterans' Commission can legally expend \$800, or so much as falls in the fiscal biennium, per child for the education of said child in three calendar years under the provisions of Appropriation Act No. 43-A, approved the 28th day of July, 1941, Appropriation Acts 1941, page 73.

Harrisburg, Pa., May 6, 1942.

Honorable R. M. Vail, Acting Adjutant General, Department of Military Affairs, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether under the provisions of Appropriation Act No. 43-A, approved the 28th day of July, 1941, Appropriation Acts page 73, the Veterans' Commission can legally expend \$800, or so much thereof as falls in the fiscal biennium, per child for the education of said child in three years instead of in four years as previously done.

The reason for the inquiry is that many educational institutions are accelerating their courses of instruction and by the addition of summer courses shortening the period of instruction from four years to three years, in order to enable the student to attain earning capacity one year earlier.

Appropriation Act No. 43-A, approved the 28th day of July, 1941, provides as follows:

Section 1. The sum of forty thousand dollars (\$40,000), or as much thereof as may be necessary is hereby specifically appropriated to the Department of Military Affairs to be used during the fiscal biennium beginning June first, one thousand

nine hundred forty-one, for paying gratuities for the children between the ages of sixteen and twenty-one years of soldiers, sailors, marines, female field clerks, yeomen (female) or members of the enlisted nurse corps of the United States, who die or have died, of Spanish-American War or World War service connected disabilities as certified from veteran administration records. Such children must have lived in the Commonwealth of Pennsylvania for five years immediately preceding the date upon which the application is filed.

Section 2. Gratuities shall be paid out of the appropriation made by this act for the account of such children as shall be certified by the State Veterans' Commission (1) as coming within the class described in section one of this act, and (2) as attending any State or State-aided educational or training institution of a secondary or college grade or other institution of higher education, business school, trade school, hospital providing training for nurses, school or institution providing courses in beauty culture, art, radio or undertaking or embalming, or such other educational training within this Commonwealth as approved by the State Veterans' Commission, and (3) as being unable without such gratuity to pursue his or her education or training. Payments not to exceed the sum of two hundred dollars (\$200) per school year per child shall be made to such institutions upon the submission by them of proof that bills have been incurred or contracted for matriculation fees and other necessary fees, tuition, board, room rent, books and supplies for such children in a definite amount for the school year. Such proof shall be submitted to the State Veterans' Commission which shall attach the same to the requisitions prepared for payments out of the appropriations made by this act.

The title to this act states, inter alia, that it is "for the maintenance and education of children of certain soldiers, sailors, marines, \* \* \*." Therefore, the primary purpose of the legislature was the education of certain children. The question arises as a result of the provision in said statute as follows:

Payments not to exceed the sum of two hundred dollars (\$200) per school year per child. \* \* \*

Evidently the school authorities intend to condense their former four year courses into three years by the addition of two summer courses of twelve weeks each. The restriction in the act in question limits the amount which can be paid per child per school year. We can see no reason why the summer courses for 1942 and 1943 should not be considered the equivalent of a school year, in which event the Veterans' Commission upon proper proof of expenses incurred to the school would authorize the payment of \$100 for each summer session, or \$200 for both summer sessions which would be considered a school year under the act in question.

In view of the fact that the recipients of these gratuities will receive the full course of instruction in three years which they would have received in four years under the prior practice, and further that the cost remains the same, the Veterans' Commission can legally expend \$800, or so much as falls in the fiscal biennium, per child for the education of said child in three calendar years under the provisions of Appropriation Act No. 43-A, approved the 28th day of July, 1941, Appropriation Acts 1941, page 73.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ROBERT E. SCRAGG,  
*Deputy Attorney General.*

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OPINION No. 418

*Corporations—Right to act as transfer agent or registrar—Business corporation—Supervision by Department of Banking—Business Corporation Law of 1933, as amended—Banking Code of 1933, sec. 1506, as amended.*

1. A corporation may properly be organized under the Business Corporation Law of May 5, 1933, P. L. 364, for the purpose of acting as a transfer or fiscal agent or as registrar of shares, bonds, or other obligations, and if so organized is not subject to the supervision of the Department of Banking.

2. One acting as a transfer agent or registrar is not acting in a fiduciary capacity within the meaning of section 1506 of the Banking Code of May 15, 1933, P. L. 624, as amended, which prohibits any corporation other than a bank and trust company or a trust company from acting in such a capacity.

Harrisburg, Pa., May 11, 1942.

Honorable John C. Bell, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have presented an inquiry as to whether or not a corporation chartered under the Business Corporation Law may act as "transfer or fiscal agent, and registrar of shares, bonds, or other obligations."

The department of State has recently granted a charter to a corporation, the declared purpose of which is, inter alia, to act as "transfer or fiscal agent, and registrar." You inquire whether the grant of such power by the Department of State conflicts with Section 1506

of the Banking Code, being the Act of May 15, 1933, P. L. 624, as amended, 7 P. S. § 819-1506. Section 1506 provides as follows:

The only corporations organized under the laws of this Commonwealth which shall have authority to act in this Commonwealth as trustees, guardians, executors, administrators, or in any similar fiduciary capacity, shall be bank and trust companies and trust companies.

It would seem that the fiduciary capacity referred to in the Banking Code is that activity contemplated in the various fiduciary acts of this Commonwealth, because we find specific mention of trustees, guardians, executors and administrators. That is, there is apparently no intention to go beyond the commonly accepted meaning of the term "fiduciary."

The thought is advanced, however, that if acting as transfer or fiscal agent and registrar of shares, is acting in a fiduciary capacity similar to that of a trustee, guardian, executor or administrator, only a bank and trust company or a trust company may so act.

We must examine, then, the possibility of the activity of a registrar or transfer or fiscal agent being of a fiduciary capacity similar to that of a trustee, guardian, executor or administrator. A registrar is merely one who keeps a register. His operation would appear to extend no further than that. (53 C. J. 1082.) A transfer agent, as defined in Webster's New International Dictionary, is "the individual or corporate agency that keeps the ownership records and makes transfer of title to corporate securities." A fiscal agent, as defined in the same dictionary, is "a financial representative," and this dictionary gives as an example, "a trust company serving a corporation." But in this example there is no suggestion of exclusiveness.

It would seem from the above definitions and example that there is little of the fiduciary element in the activities embraced by the terms "transfer or fiscal agent and registrar."

We attach major significance to that fact that in the Code the treatment accorded the terms "fiduciary" and "transfer or fiscal agent, and registrar" is separate and distinct. Section 1102 of the Banking Code, in subparagraph (1), specifically grants to trust companies and bank and trust companies the right to act as fiduciary, and in subsection (3) gives the same institutions the right to act as transfer or fiscal agent and registrar of shares. Section 1102 provides as follows:

In addition to the general corporate powers granted by this act, and in addition to any powers specifically granted to a bank and trust company or a trust company elsewhere in this act, a bank and trust company or a trust company shall have

the following powers, subject to the limitations and restrictions imposed by this act:

(1) To act as fiduciary and, pursuant thereto, to receive and dispose of real or personal property;

\* \* \* \* \*

(3) To act as transfer or fiscal agent, and registrar of shares, bonds, or other obligations;

Certain subsequent sections of the Banking Code amplify the subsections of section 1102. Thus, section 1103 dwells upon the exercise of fiduciary powers by a bank and trust company or a trust company. Likewise, section 1105 dwells upon the exercise of transfer agent or fiscal agent and registrar powers of a bank and trust company or a trust company.

It would seem, in other words, that if the framers of the Banking Code considered the activities of a transfer or fiscal agent and registrar as of a fiduciary capacity similar to that of executor, administrator and trustee, there would have been no need for separate treatment, as above outlined.

The argument has been advanced that if the only incorporated institutions under your supervision which can act as transfer or fiscal agent or registrar, are bank and trust companies or trust companies, it would hardly seem that a business corporation would be privileged to act as transfer or fiscal agent or registrar. Your jurisdiction extends to banks, bank and trust companies, trust companies, private banks and certain specially chartered savings banks. Private banks are unincorporated and do not come within the statutory prohibition herein discussed. The effect of the above quoted legislation, therefore, is that a bank and trust company or a trust company under your jurisdiction, may act as transfer or fiscal agent and registrar, but an incorporated bank, that is, an institution not having trust powers, or a specially chartered savings bank could not so act.

We take it, however, that section 1102 merely provides what kind of banking institutions under your jurisdiction may exercise the powers therein designated. Section 1102 does not attempt to say that all the powers therein granted may be exercised exclusively in Pennsylvania by bank and trust companies or trust companies.

There is no prohibition in the Business Corporation Law against corporations being formed to act as transfer or fiscal agents or as registrars. The prohibition therein is that banking businesses are not to be chartered by the Department of State. The only basis upon which we could consider a corporation exercising the powers of transfer or fiscal agent or registrar as doing a banking business is that such

activity would constitute the work of a fiduciary within the meaning of that term as used in the Banking Code. We have disposed of this hereinbefore.

It is our opinion that:

1. The Department of State may grant a charter to a business corporation for the purpose of acting as transfer agent, fiscal agent or registrar of shares, bonds and other obligations.

2. Grant of such a charter by the Department of State does not conflict with the provisions of the Banking Code.

3. It follows that it is not incumbent upon the Department of Banking to examine and supervise a business corporation which is authorized to conduct the business of transfer or fiscal agent and registrar of shares, bonds, or other obligations.

Very truly yours,

DEPARTMENT OF JUSTICE.

CLAUDE T. RENO,  
*Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

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OPINION No. 419

*State Government—Lien against real estate—Right of Attorney General to release or postpone—Right of Commonwealth to take deed in compromise—Subsequent disposition of land—Necessity for legislative approval—Administrative Code of 1929, sec. 514 (a)—Act of May 29, 1931.*

1. The Attorney General, under his common-law powers, is vested with authority to satisfy, release, modify, or postpone the lien of a judgment of the Commonwealth.

2. While the Commonwealth may accept a deed from an execution debtor in compromise of a claim or judgment, neither the Attorney General nor any other official of the Commonwealth can, without express legislative action, because of the prohibition contained in section 514 (a) of The Administrative Code of April 9, 1929, P. L. 177, convey title to property so acquired or acquired by the Commonwealth in any other manner, except that property acquired under the Act of May 29, 1931, P. L. 214, may be conveyed in the manner prescribed in section 3 thereof.

Harrisburg, Pa., May 11, 1942.

Honorable Howard L. Russell, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of October 31, 1941, requesting our advice relative to your reimbursement procedure. You inquire (1) whether the Attorney General or any other official of the Commonwealth has the authority to release the Commonwealth's right in the lien of any judgment against real estate of the judgment debtor upon payment to your department of a part or the whole of the sale price; (2) whether the Attorney General or any other official of the Commonwealth has the authority to postpone the lien of any judgment of the Commonwealth against real estate of the judgment debtor; (3) whether the Commonwealth can convey title to a prospective purchaser if it had taken a voluntary deed from the debtor for property against which the Commonwealth held a judgment in satisfaction of the Commonwealth's claim for reimbursement, in lieu of obtaining title by execution or foreclosure under the Act of May 29, 1931, P. L. 214.

It is well settled that the Attorney General in addition to his statutory powers, has broad common law powers: See *Commonwealth v. Lewis*, 282 Pa. 306 (1925); *Commonwealth v. Margiotti*, 325 Pa. 17 (1936); *People v. Miner*, 2 Lans. (N. Y.) 396, 398; 6 *Corpus Juris*, section 13, pages 809, 810; and 2 *Ruling Case law*, section 4, page 913. Among these broad common law powers is the power of prosecuting civil suits to judgment including the compromising of claims, the discontinuance of suits, or satisfaction of judgments and the release, modification, or postponement of judgments. See above cited cases and authorities.

As to the problem of conveyance of title to real estate by the Commonwealth to a prospective purchaser, we would state that public officials have only such authority as is given them by the Constitution, statutes or common law.

The Act of May 29, 1931, P. L. 214, 72 P. S. 1412, declares the method whereby the Commonwealth may take title to property in order to protect the lien of a judgment and convey title by providing in sections 1 and 3 as follows:

Section 1. Be it enacted, &c., That at any judicial sale of any property upon which the Commonwealth, or any department, board, or commission thereof, holds a mortgage or has a lien or liens of any nature whatsoever arising out of

unpaid taxes, bonus, interest, penalties, or any other public account, the Commonwealth, acting through the Department of Justice, is hereby authorized and empowered to bid in such property, if necessary, for the protection of its interest. Title shall be taken in the name of the Commonwealth.

Section 3. \* \* \* the Department of Justice is hereby authorized and directed to execute and deliver a deed or other appropriate document conveying or transferring the property. Any such conveyance or transfer shall be free and clear of all liens and encumbrances in favor of the Commonwealth, except the lien of a purchase money mortgage, if any, contemporaneously executed and delivered to the Commonwealth.

Section 514 (a) of The Administrative Code of 1929, *supra*, prohibits the Commonwealth or its officials, with certain exceptions, from conveying real estate by providing that no department, board or commission shall sell or exchange any real estate belonging to the Commonwealth without specific authority from the General Assembly so to do. If title to real estate is taken in the manner prescribed by the Act of May 29, 1931, P. L. 214, *supra*, the Commonwealth, by the Department of Justice, is authorized to convey or transfer such real estate free and clear of all liens and encumbrances of the Commonwealth. See section 3 of said act. If title to real estate is acquired in any other manner, title cannot be conveyed to the purchaser without legislative authority.

Nothing herein contained is to be construed as prohibiting the Commonwealth from taking a deed from the execution debtor in compromise of a claim or judgment. What we do hold is that legislative action is necessary to convey title to real estate.

In view of the foregoing, we are of the opinion, that (1) and (2) of the Commonwealth's officials, the Attorney General, under his common law powers is vested with authority to satisfy, release, modify or postpone the lien of a judgment of the Commonwealth; (3) Because of the prohibition contained in section 514 (a) of The Administrative Code of 1929, *supra*, neither the Attorney General nor any of the officials of the Commonwealth can, without express statutory authority, convey title to a prospective purchaser. If the Commonwealth takes property by purchase at a judicial sale, the Commonwealth of Pennsylvania, by the Department of Justice, can convey a title as prescribed by Section 3 of the Act of May 29, 1931, P. L. 214, 72 P. S. § 1412. Nothing herein contained is to be construed as prohibiting the Commonwealth from taking a deed from the execution

debtor in compromise of a claim or judgment. What we do hold is that legislative action is necessary to convey title to real estate.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 420

*State Scholarship—Right of student to be awarded \$100 per year for 4 college years if his course is completed in 3 years. Act of July 18, 1919, P. L. 1044.*

Students holding scholarships awarded under the provisions of the Act of July 18, 1919, P. L. 1044, 24 P. S. § 2451, et seq., are entitled to the sum of one hundred dollars for four school years, during the number of such years covered by the scholarship.

Harrisburg, Pa., May 27, 1942.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether a student to whom a State Scholarship has been awarded may receive \$100 per year for four college years if his college course is completed within three calendar years.

You have informed us that some approved colleges and universities have arranged their courses of instruction and vacations so that the students may complete a regular four-year course within a period of three calendar years; although these schools are not planning to reduce the curriculum or the tuition charge for their courses. It appears that the shortening of the normal four-year course will be accomplished by the elimination of vacations.

The Act of July 18, 1919, P. L. 1044, 24 P. S. § 2451, et seq., reads as follows:

Section 1 provides:

For the purpose of assisting worthy young men and women graduates of secondary schools of the State to obtain higher education, the State will award competitive scholarships of the value of one hundred dollars per year for four years to enable selected students to attend any institution in the State of Pennsylvania approved by the College and University Council.

Section 2 provides:

Appointments to such scholarships shall be made by the State Board of Education, and the persons entitled to such appointments shall be determined by competitive examination to be conducted under the supervision of the State Board of Education. Due notice of any examination to be held under the provisions of this act shall be given in such manner as the State Board of Education may prescribe.

Section 3 provides:

One scholarship shall be awarded to each county. In any county where there is more than one entire senatorial district, one scholarship shall be awarded for each entire senatorial district.

The act contains no specific provision concerning the situation involved here. The pertinent language of the statute relative to our problem is "*The State will award competitive scholarships of the value of one hundred dollars per year for four years.*" (Italics ours.) Whether or not this phrase was intended to mean "a school year" or "a calendar year" must be determined from an application of the general rules of statutory construction.

In the case of *Turbett Township v. Port Royal Borough Overseers of the Poor*, 33 Pa. Super. Ct. 520 (1907), Judge Rice, inter alia, stated:

\* \* \* The effects and consequences of the proposed construction of a law, as well as its reason and spirit, will be looked into in determining the legislative intent, which is the criterion by which all acts must be construed. Hence, if there is room for construction, the court will prefer that construction which is most consonant with the purpose for which the act was passed. \* \* \*

The following statement from the case of *Big Black Creek Improvement Company v. Commonwealth*, 94 Pa. 450, was also quoted in the above case:

\* \* \* "statutes are to be construed so as may best effectuate the intention of the makers, which sometimes may be collected from the cause or occasion of passing the statute, and, where discovered, it ought to be followed with judgment and discretion in the construction, though that construction may seem contrary to the letter of the statute."

The only reported case in the Commonwealth of Pennsylvania which is enlightening on our particular problem is that of *Keppelman v. City of Reading*, 14 Pa. Dist. 61, 63 (1904) wherein Endlich, J., stated inter alia:

"One year" (no leap year being in question) means a period of 365 days from any given date; i. e., a period, the lapse of

which, from a given date in one year, will bring us to the same date in the next year. That is the popular understanding of the word, and must control in the absence of sufficient apparent reason for holding that another was intended. No doubt a different meaning may be given to the word "year" in statutes, or in contracts where the context or subject-matter points to such intent. Thus, it may appear that a fiscal year is intended: *Glasgow v. Rowse*, 43 Mo. 479, or an official year: *United States v. Dickson*, 15 Pet. (U. S.) 141, or the period intervening between two elections: *Inhabitants of Paris v. Inhabitants of Hiram*, 12 Mass. 262, or a period ending with the fruit season: *Brown v. Anderson*, 77 Cal. 236, and so on. See *Engleman v. State*, 2 Ind. 91; *Knode v. Baldridge*, 73 Ind. 54; *Thornton v. Boyd*, 25 Miss. 262; *Bartlett v. Kirkwood*, 2 E. & B. 771. But such cases, whether of contract or of statute, are the exceptions which prove the rule, and, as all the authorities show, must be founded on something in the language of the statute or contract, or in its manifest purposes clearly displacing the rule. What is the meaning of the language used in this statute has already been seen. Is there anything in the purpose of the enactment that would warrant a construction of the word "year" in any but its popular and usual sense?

In the Permanent Edition of "Words and Phrases," Vol. 45, page 649, under the caption "School Year" we find the courts of other jurisdictions have had occasion to pass upon the meaning of this phrase.

Accordingly, we note that in the case of *Brookfield v. Drurry College*, 139 Mo. App. 339, 123 S. W. 86, 94, it was held that:

The word "year," when used in employing teachers, means a college or school year, and not a calendar year.

In *Westerman v. Cleland*, 12 Cal. App. 63, 106 P. 606, 609, it was ruled that:

A contract of a teacher with school trustees to teach one year from July 5, 1899, at a salary of \$1,000, payment to be made by requisitions upon the county superintendent of schools, was a contract to teach for a school "year."

Similarly, in a Georgia case, *Long v. Wells*, 198 S. E. 763, 768, it was held that:

The word "years," in provision in teachers' civil service act that teachers employed for a total period of three years should be automatically reappointed, contemplated "school years," which need not necessarily include "calendar years," or begin on July 1, 1937, the effective date of the statute. Laws 1937, p. 879, § 2.

Probably the strongest authority cited on this particular subject is that of *Williams v. Bagnelle*, 138 Cal. 699, 72 P. 408, 410, citing and adopting *Brown v. Anderson*, 77 Cal. 236, 19 P. 487, wherein it was held that:

The term "year" does not necessarily mean a calendar year. Its meaning is to be gathered from the connection in which the term is used. "The contract was with reference to school-teaching, and, in the absence of anything to the contrary, it must be construed as if the provision of the law limiting the time for which the contract could be made was inserted in it, and that the term 'year' meant a school year, Pol. Code, § 1878, which begins the 1st day of July and ends on the 1st day of June."

It would, therefore, appear that the meaning of the word "year" in our statutes is to be ascertained from the context of the language which the legislature used in providing for state scholarships

In our mind there can be no doubt of the fact that in passing the act with which we are concerned, the legislature intended that it be "for the purpose of assisting worthy young men and women graduates of secondary schools of the State to obtain higher education." In construing the phrase "\* \* \* scholarships of the value of one hundred dollars per year for four years to enable selected students to attend any institution in the State of Pennsylvania approved \* \* \*" if the announced purpose of the act be kept in mind, it appears clear that the legislature did not intend to require that the four years of education be acquired in four calendar years, but rather in four school years.

Because of the present national emergency it is most advantageous for those students attending colleges and universities to complete their courses of study in less than four calendar years, which is the ordinary period of time for the completion of their courses. It is common knowledge that throughout our Commonwealth and Nation, colleges, universities, technical schools, medical colleges, and the many other various graduate schools, to meet the demands upon their student personnel during the present emergency, have arranged their courses of study to run through vacations. This allows a student to finish his course sooner, although he puts the same time in his classes. Under this state of facts students are actually completing four ordinary school years, although by omitting vacations, they complete their courses within the shorter period of three calendar years.

Certainly it cannot reasonably be argued that the recipients of State scholarships are only entitled to receive their one hundred dollar scholarships for four calendar years. Such conclusion would result

in discrimination against the winners of such scholarships under present conditions, because they would be deprived of one year's scholarship, if they avail themselves of the same rights that their fellow classmates have, of finishing their schooling in a shorter period, in order to be available for whatever service they can render our Nation in its present struggle to preserve its democracy, and all of its other heritages.

It is both logical and consistent with the purposes of the act to conclude that the phrase "one hundred dollars per year for four years," means "one hundred dollars per school year for four *school* years." This not only would be consistent with the purposes of the act, but it also would be equally consistent with the prime purpose in our present daily lives, to be most effective in all our efforts relative to our national defense.

The Act of May 20, 1921, P. L. 1014, § 1, 24 P. S. § 884, provides that the Act of July 18, 1919, P. L. 1044, establishing the scholarships, shall be administered by the State Council of Education, and that the Council shall make all regulations necessary to carry on its proper work and affairs. In the absence of such regulations, there is nothing in the Act of 1919, P. L. 1044, which prohibits the granting of scholarships to students of one hundred dollars per year, for each school year. In fact, such an action is in keeping with the express purpose of the act.

It is our opinion, and you are accordingly advised, that students holding scholarships awarded under the provisions of the Act of July 18, 1919, P. L. 1044, 24 P. S. § 2451, et seq., are entitled to the sum of one hundred dollars for four school years, during the number of such years covered by the scholarship.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

GEORGE J. BARCO,  
*Deputy Attorney General.*

## OPINION No. 421

*Civil Service—Personnel Director—Legal residence requirements—Act of August 5, 1941, P. L. 752.*

Under the provisions of the Civil Service Act, the Act of August 5, 1941, P. L. 752, 71 P. S. 741.1, et seq., persons applying for the position of Personnel Director shall be citizens of the United States, and shall have been legal residents of the Commonwealth for a period of not less than one year before making application for such position.

Harrisburg, Pa., May 27, 1942.

Honorable Robert Hall Craig, Chairman, State Civil Service Commission, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication requesting advice as to the legal residence requirement for the Personnel Director of the State Civil Service Commission under the Civil Service Act, the Act of August 5, 1941, P. L. 752, 71 P. S. 741.1, et seq.

At the outset we would call your attention to the fact that under section 205 (a) of said Civil Service Act, it is expressly provided that:

The director shall be in the classified service. \* \* \*

Additionally, section 205 (b) provides that in the holding of competitive examinations and the establishment of an employment list of persons found eligible for appointment as director, the "commission shall have the same powers and duties with respect to the conduct of the examination, establishment of the employment list and making an appointment therefrom that are vested in or imposed upon the director under the provisions of this act with respect to other positions in the classified service."

Referring to Article V of the Civil Service Act which provides for the selection of employes for entrance to or promotion in the classified service we find in section 501 (a) the following provision:

Except as otherwise provided in this act, appointments of persons entering the classified service or promoted therein shall be from eligible lists established as the result of examinations given by the director to determine the relative merit of candidates. Such examinations shall be written and competitive and open to all persons who may be lawfully appointed to positions within the classes for which the examinations are held. Persons applying for positions or promotions in the offices designated as central administrative offices (which shall include all those having jurisdiction throughout the State) *shall be citizens of the United States and shall have been legal residents of the Commonwealth for a period of not less than one year before making application*, and persons applying for positions or promotions in offices designated as

district offices (which shall include all those whose jurisdiction is limited to a particular district) shall be citizens of the United States, and shall have been legal residents of the Commonwealth for a period of not less than one year, and in the district in which such office having jurisdiction thereof is located, for a period of not less than six months before making application. \* \* \* (*Italics ours.*)

There is no ambiguity in the above section of the Civil Service Act. It is quite clear that the Personnel Director is in the classified service, and the same powers and duties as are imposed on the director relative to other positions in the classified service are imposed on the Commission in the examination, establishment of employment lists and making appointment of the Personnel Director. One of these duties provided for in said Civil Service Act is the requirement that all persons applying for the position of Personnel Director shall be citizens of the United States, and shall have been legal residents of the Commonwealth for a period of not less than one year before making application.

In view of the foregoing, we are of the opinion, and you are accordingly advised, that under the provisions of the Civil Service Act, the Act of August 5, 1941, P. L. 752, 71 P. S. 741.1, et seq., persons applying for the position of Personnel Director shall be citizens of the United States and shall have been legal residents of the Commonwealth for a period of not less than one year before making application for such position.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 422

*State Government—Commonwealth employee—Induction into military service—Benefits to dependent—Change in status after induction—Act of June 7, 1917, as amended.*

1. The status of dependency, established as existing at the time of the induction of a Commonwealth employee into military service, under the provisions of the Act of June 7, 1917, P. L. 600, as amended by the Acts of June 25, 1941, P. L. 207, April 21, 1942 (no. 19), and May 6, 1942 (no. 28), may be changed after such induction, as where the dependent later receives income from sources other than the benefits under said act.

2. Whether dependency ceases to exist because a dependent receiving benefits under the Act of June 7, 1917, P. L. 600, as amended, comes into the enjoyment of an income from other sources in excess of the amount of benefits received, depends upon whether the income from such other sources is sufficient amply and adequately to maintain the dependent suitably without the aid or assistance of others.

Harrisburg, Pa., May 28, 1942.

Honorable I. Lamont Hughes, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether the status of dependency, established as existing at the time of the induction of a Commonwealth employee into the military service, under the provisions of the Act of June 7, 1917, P. L. 600, as amended by the Act of June 25, 1941, P. L. 207, 65 P. S. §§ 111-113, and by the Acts of April 21, 1942, Sp. Sess. P. L. —, Act No. 19, and of May 6, 1942, Sp. Sess. P. L. —, Act No. 28, may be changed after such induction. You specifically inquire whether the fact that a dependent later receives income from sources other than the benefits under said act in excess of such benefits, changes the status of the recipients of such benefits from that of dependency to non-dependency.

This department has already ruled in Formal Opinion No. 412, dated January 22, 1942, addressed to you, that before any person designated as a dependent of an applicant under the aforesaid legislation may be paid any benefits, the person so designated must have been in fact dependent upon the applicant at the time he enlisted, enrolled or was drafted into the military or naval service of the United States.

The Act of June 7, 1917, P. L. 600, as amended, *supra*, uses the words "dependent" and "dependency" in their popularly understood meaning and sense. 1917-18 Op. Atty. Gen. 584, 586. A dependent is "one who is sustained by another, or who relies on another for support or favor." Webster's New International Dictionary, Second Edition, page 701. Dependency is defined by the same authority as the "state of being dependent."

In passing upon the question of what constitutes dependency within the meaning of the legislation being discussed, this department has already ruled that if the person or persons designated as dependents by an applicant have no means of support other than such as may be provided by the applicant, the case is manifestly one of dependency within the meaning of such legislation. We have also ruled that it is equally clear that dependency does not exist within the meaning of the act where the designated dependents have independent means

of their own ample and adequate to maintain them suitably without the aid or assistance of others. The act is to be given a liberal construction and administration best to advance the generous purpose of the Commonwealth to provide for the families of those joining the armed forces of the country.

Section 3 of the Act of June 7, 1917, P. L. 600, as amended, provides that the statement required to be filed by section 2 thereof shall be prima facie evidence of the dependency of any person named as a dependent in such statement. Such prima facies of dependency conferred on the statement may, however, be rebutted by proof to the contrary. 1917-18 Op. Atty. Gen. 153. The ultimate fact of dependency is to be decided by the head of the department, bureau, commission or office of the Commonwealth wherein the applicant was employed prior to induction into military service, with the aid of the Board of Review created by Executive Orders of the Governor dated March 13 and July 31, 1941, and in accordance with rules and regulations promulgated by that board.

As indicated above, dependency must be established as existing at the time of induction, and such dependency is prima facie established by the statement filed under the act. Once the status of dependency is established, there is a presumption that it continues. However, this presumption of the continuance of the status of dependency may be overcome by proof to the contrary, just as the prima facies of dependency in the first place may be rebutted.

The primary purpose of the act is not to serve those who enter the service of the United States, but rather, those who are dependent upon them. The act endeavors to maintain to the degree permitted by its provisions, the status of the dependents of an employee of the Commonwealth which obtained at the time of his induction into military service. As we have already implied this status is subject to change. A status of dependency which existed at the time of induction may later change to a status of non-dependency. Such change would be occasioned by the receipt of income by the so-called dependents, which income they were not receiving at the time of induction, "ample and adequate to maintain them suitably without the aid or assistance of others." 1917-18 Op. Atty. Gen. 584, 586.

You have also raised the specific question whether dependency ceases to exist due to the fact that a dependent receiving benefits under the act comes into enjoyment of an income from other sources in excess of the amount of benefits received. The answer to this question obviously depends upon the amounts involved, and whether the income from sources other than benefits is sufficient amply and adequately to maintain the dependent suitably without the aid or assistance of

others. The highest benefits that can be paid under the act to the dependents of an employee are \$166.67 per month. This is because the act provides for the payment of one-half of the salary or wages of the inductee, provided such one-half does not exceed \$2,000 per annum. From this figure of \$166.67, benefits being paid to the dependents of an employee range all the way down to as low as \$4.87 per month. The average benefits being paid to the dependents of any employee are \$60.29 per month. As of the middle of February of 1942 there were about 600 Commonwealth employees being paid benefits under the act. Of this number the dependents of about 70 such employees were receiving from \$4.87 to \$40 per month; dependents of about 204 employees benefits from between \$40 to \$50 per month; dependents of about 112 employees from between \$50 to \$60 per month; dependents of about 57 employees between \$60 and \$70 per month; dependents of about 42 employees between \$70 and \$80 per month; dependents of about 43 employees between \$80 to \$90 per month; dependents of about 10 employees between \$90 and \$100 per month; and dependents of about 61 employees from \$100 to \$166.67 per month.

Dependency is a question of fact to be determined after taking into consideration all of the known factors relating to any given case. What may constitute dependency within the meaning of the act in one case might not in another. There are many factors which should be considered and we shall not attempt to enumerate all of them. However, some of such factors are the obligations resting upon the persons designated as dependents, the scale of living to which such persons have been accustomed, the usual earnings of the one upon whom they are dependent, income of such persons from sources other than the one upon whom they are dependent and the state of well-being or health of such persons.

It is our opinion, therefore, and you are accordingly advised, that the status of dependency, established as existing at the time of the induction of a Commonwealth employee into the military service, under the provisions of the Act of June 7, 1917, P. L. 600, as amended, may be changed from one of dependency to that of non-dependency, or from one of total or partial dependency to one of partial dependency or non-dependency.

Very truly yours,

DEPARTMENT OF JUSTICE,  
CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

## OPINION No. 423

*Charities—Solicitation—Act of May 13, 1925, as amended—Membership drive—Use to obtain members or donations—Determination by Department of Welfare.*

1. The primary purpose of the Act of May 13, 1925, P. L. 644, as amended by the Act of June 20, 1935, P. L. 358, being to regulate public appeals for donations or subscriptions in money or property and to protect the public from illegal solicitation of funds, an organization conducting a "membership drive" for the purpose of obtaining money or property rather than members must comply with the statute, but bona fide efforts to secure memberships only are not within the purview of the act.

2. It is the right and duty of the Department of Welfare to determine in each instance, in accordance with standards established by it, whether a membership drive is being used for the primary purpose of obtaining donations or subscriptions rather than memberships.

Harrisburg, Pa., May 28, 1942.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether agencies, which solicit contributions under the guise of "membership drives," are included within the provisions of the Act of May 13, 1925, P. L. 644 (commonly referred to as the "Solicitation Act"), as amended by the Act of June 20, 1935, P. L. 358, 10 P. S. § 141 et seq., and, therefore, are required to obtain a certificate of registration before solicitation of funds.

The title of said act is as follows:

## AN ACT

Relating to and regulating the solicitation of moneys and property for charitable, religious, benevolent, humane and patriotic purposes.

Section 1 of said act, referring to certificates of registration, provides as follows:

Thirty days after the approval of this act *it shall be unlawful for any person*, copartnership, association, or corporation, except in accordance with the provisions of this act, *to appeal to the public for donations or subscriptions in money or in other property*, or to sell or offer for sale to the public any thing or object whatever to raise money, or to secure or attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment, or exhibition, or by any similar means for any charitable, benevolent, or patriotic purpose, or for the purpose of ministering to the material or spiritual needs of human beings, either in the United States or elsewhere, or of relieving suffering of ani-

mals, or of inculcating patriotism, *unless the appeal is authorized by and the money or other property is to be given to a corporation, copartnership, or association holding a valid certificate of registration from the Department of Welfare, issued as herein provided.*" (Italics ours.)

Under Section 11 (10 P. S. § 151) of the act, as amended, certain organizations are exempt from the provisions of the act requiring registration as follows:

This act shall not apply to fraternal organizations incorporated under the laws of the Commonwealth, religious organizations, raising funds for religious purposes, colleges, schools, universities, labor unions, municipalities, or subdivisions thereof, nor to charitable institutions or agencies required by the provisions of existing law to file reports with the Department of Welfare or with any other department or office of the Commonwealth.

It is apparent that all such soliciting organizations are required by section 1 of the act to obtain a certificate of registration, unless they fall within the class of organizations expressly exempted therefrom by section 11 of the act.

The primary purpose of the Solicitation Act is to protect the public from illegal solicitation of funds. This purpose is well stated in the case of *Commonwealth v. McDermott*, 296 Pa. 299, 304 (1929), *infra*.

The act aims to regulate appeals to the public for all donations or subscriptions in money or other property and, therefore, real or bona fide membership drives which are launched to secure memberships only would not come within the purview of the act; that is, donations or subscriptions as used in the Solicitation Act do not include legitimate membership fees or dues in an organization. However, if "membership drives" are used for the purpose of obtaining money or property rather than members, then organizations conducting such membership drives would come under the Solicitation Act unless the soliciting organization was exempt under section 11. The act cannot be circumvented by solicitation under the guise of membership drives or dues. See the case of *Blume v. Crawford County*, 217 Iowa 545, 250 N. W. 733, 92 A. L. R. 757, where it was held that "dues" and "pledges" are not synonymous.

The Department of Welfare, under Section 4 of the Solicitation Act, has the distinct and positive right and duty to look beyond the name "membership drive" to determine the real purpose of the drive; that is, whether the drive is being used to obtain money or members, whether payments are "dues" or "donations" or "subscrip-

tions": See *Commonwealth v. McDermott*, supra, where the purpose of the Solicitation Act is well presented as follows:

\* \* \* It embraces specifically any and all kinds of associations that may be entirely or in part carrying out plans and campaigns for benevolent purposes; and its enactment was an exercise by the legislature of the police power of the State to prevent the public from being made the victim of swindling and corrupt operations engineered by persons or associations hiding their illegal practices under the guise of charity. \* \* \*

Standards for establishing this fact that organizations are using membership drives not to obtain members but for the primary purpose of obtaining "donations or subscriptions in money" should be included in rules and regulations established by the Department of Welfare and approved by the Department of Justice.

If your department should ascertain that a membership drive is being used, not to obtain members, but for the primary purpose of obtaining funds by way of donations or subscriptions, the organization would come within the provisions of the Solicitation Act, whether the association was in existence, or merely in the process of formation.

In view of the foregoing, we are of the opinion and you are accordingly advised that since the Solicitation Act requires certificates of registration for organizations which make appeals to the public for donations or subscriptions in money or other property, or conduct any of the activities defined by the act, organizations conducting bona fide "membership drives" for members only do not come within the provisions of the Solicitation Act, the Act of May 13, 1925, P. L. 644, as amended by the Act of June 20, 1935, P. L. 358, 10 P. S. § 141 et seq. However, your department has the right and duty to look beyond the name of "membership drive" to determine the real object of the solicitation; that is, whether such drive is conducted for the raising money, or obtaining members. If such "membership drive" is used to obtain money contributions, subscriptions or donations rather than members, the organization soliciting comes under the act, and your department should require that such organization obtain a certificate of registration under the Solicitation Act, supra, unless the soliciting organization is exempt under section 11 of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

H. J. WOODWARD,  
*Deputy Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

## OPINION No. 424

*Judges—Leave of absence for military duty—Requisition for salary—Legality of Payment—Constitution, Art. XII—sec. 2—Acts of May 15, 1894, P. L. 186; July 2, 1941, P. L. 231—Case of Thomas Linas Hoban.*

The Auditor General may not legally approve a requisition for salary claimed to be due Thomas Linas Hoban as additional law judge of the forty-fifth judicial district of Pennsylvania for the month of January, 1942.

Harrisburg, Pa., May 29, 1942.

Honorable F. Clair Ross, Auditor General, Harrisburg, Pennsylvania.

Sir: By your communication of January 20, 1942, you have requested us to advise you whether you may lawfully honor a requisition presented to you for the January, 1942, salary claimed to be due Thomas Linas Hoban, who, on November 6, 1935, was duly elected additional law judge of the forty-fifth judicial district of Pennsylvania, and, while serving as such judge was on February 17, 1941, ordered into active service with the United States Army as a lieutenant-colonel. Prior to the entry of the United States in the present war, and prior to the decision of Commonwealth ex rel. Crow v. Smith, hereinafter referred to, the Chief Justice of the Supreme Court of Pennsylvania signed an order granting Judge Hoban leave "to remain absent from his judicial duties for a period of one year commencing February 17, 1941, or for so much thereof as he is required to remain in the military service of the United States under the order of the President of the United States."

We assume that Judge Hoban has not, since his induction into active military service February 17, 1941, performed any of the duties or exercised any of the powers imposed or conferred upon him as one of the judges of the several courts of common pleas of the Commonwealth.

Article XII, section 2, of the Constitution of the Commonwealth, provides as follows:

No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees, or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.

As a lieutenant-colonel of the United States Army Judge Hoban holds and exercises an office of trust or profit under the United States. See Commonwealth of Pennsylvania ex rel. Crow v. Smith, 343 Pa. 446, 23 Atl. 2d 440 (1942), decided January 5, 1942, by the Supreme Court of Pennsylvania, wherein it was held that a major in the United

States Army holds and exercises an office of trust or profit under the United States within the meaning of article XII, section 2, *supra*. A fortiori a lieutenant-colonel holds such an office.

That a judge of a court of common pleas of the Commonwealth holds or exercises an office in this State to which a salary, fees or perquisites are attached, can raise no debatable question. He clearly does.

We have the anomalous situation, therefore, apparently presented, of an individual holding an office of trust or profit under the United States and at the same time holding an office in this State to which a salary is attached. This the Constitution of the Commonwealth, in article XII, section 2, quoted above, expressly forbids.

We are not unmindful of the Act of May 15, 1874, P. L. 186, as amended by the Act of July 2, 1941, P. L. 231, effective July 2, 1941, which provides in section 1:

Every person who shall hold any office, or appointment of profit or trust, under the government of the United States, whether an officer, a subordinate officer or agent, who is or shall be employed under the legislative, executive or judiciary departments of the United States, and also every member of congress, is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, notary public, mayor, recorder, burgess or alderman of any city, corporate town or borough, resident physician of the lazaretto, constable, judge, inspector or clerk of election under this commonwealth: Provided, however, That the provisions hereof shall not apply to any person who who shall enlist, enroll or be called or drafted into the active military or naval service of the United States or any branch or unit thereof during any war or emergency as hereinafter defined.

However, in the first place said legislation does not embrace the office of judge of a court of common pleas. It refers only, *inter alia*, to a "judge \* \* \* of election." In the second place, the amendatory act of July 2, 1941, which contains the all-important proviso above set forth, became effective only on the date of its enactment, namely, July 2, 1941, and Judge Hoban was inducted into active military service February 17, 1941. Moreover, and finally, no act of assembly could avoid the express mandate of the Constitution.

In *DeTurk v. Commonwealth*, 129 Pa. 151 (1889), speaking of article XII, section 2, of the Constitution of the Commonwealth, the court said at page 160 of 129 Pa.:

\* \* \* The prohibition may be enforced without legislative aid, and no action or inaction of the legislature can destroy it. \* \* \*

We next inquire whether DeTurk forfeited and created a vacancy in the office of postmaster by accepting and entering upon the duties of the office of county commissioner. In considering this question, regard must be had to the fact that the former is an office under the government of the United States, and the latter an office under the state government. If the titles to these offices were derived from a common source, it might well be held that an acceptance of the second office was an implied resignation and vacation of the first. This is the common law rule, and the current of authority in this country sustains it. But the state cannot declare the federal office vacant, nor remove the incumbent from it. It may, however, enforce the constitutional provision by proceedings to test this title to the office he holds under its laws, and it may remove him from that office, if he does not surrender the office he holds under the government of the United States. \* \* \*

Continuing at page 161 the Supreme Court said:

Did his formal resignation and complete surrender of it, [the office of postmaster] before answer, place him in accord with the constitution, and perfect his title to the office of county commissioner? By accepting it, and entering upon its duties, he elected to hold it. This election was confirmed by his express resignation of the office of postmaster, and the appointment of his successor, before issue was joined. When he appeared, in obedience to the mandate of the writ, he was not holding an office of trust or profit under the United States. \* \* \*

Almost the identical situation as that under discussion presented itself in *Commonwealth ex rel. Crow v. Smith*, supra. In that case the mayor of the City of Uniontown, Pennsylvania, entered into active service with the United States Army as a major on June 4, 1941. The respondent, Smith, was appointed to succeed Crow as mayor, and Crow thereupon filed a suggestion for a writ of quo warranto to test title to the office of mayor. It was held that Smith was the legal holder of the office of mayor. The court remarked in footnote 3, as follows:

Ordinarily, one holding two incompatible offices is allowed to elect which he desires to resign; if he declines or neglects to make a choice the court determines which office he should be compelled to relinquish: \* \* \* [authorities]; in the present case, however, there is no choice possible since it is not within the power of relator to resign from his office in the army.

It is clear from the foregoing that Lieutenant-Colonel Hoban may not hold or exercise the office of additional law judge of the forty-fifth judicial district of Pennsylvania while actively serving in the United States Army. It is equally clear that he cannot resign from the army; and we are informed that he has not resigned as judge.

Although Judge Hoban has not resigned as judge, nevertheless, we are of opinion that he cannot legally receive any salary as such judge for the month of January, 1942.

We note in passing, the Act of June 7, 1917, P. L. 600, as amended June 25, 1941, P. L. 207, April 21, 1942, Sp. Sess. P. L. —, Act No. 19, and May 6, 1942, Sp. Sess. P. L. —, Act No. 28. That act, however, relates only to an appointive officer or employee of the Commonwealth and of certain designated political subdivisions thereof. A judge of a court of common pleas is not an appointive officer; he is an elective officer. Hence the act is not applicable.

It is our opinion, therefore, and you are accordingly advised, that you may not legally approve a requisition for salary claimed to be due Thomas Linas Hoban as additional law judge of the forty-fifth judicial district of Pennsylvania for the month of January, 1942.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 425

*Medical Education and Licensure—Medical institutions—Approval—Students—  
Medical and surgical course of less than 4 years—Act of June 3, 1911, P. L.  
639—Sec. 4:*

The State Board of Medical Education and Licensure, under the provisions of Section 4 of the Medical Practice Act of June 3, 1911, P. L. 639, as amended, July 19, 1935, P. L. 1329, may approve a medical institution which allows its students to complete the required graded medical and surgical course of four years, each of which shall be of not less than thirty-two weeks of not less than thirty-five hours each week, within a period of less than four calendar years.

Harrisburg, Pa., June 8, 1942.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: You have asked us whether a medical institution may be approved by the State Board of Medical Education and Licensure if it allows its students to complete the required graded medical and surgical course of four years, each of which shall consist of not less than 32 weeks of not less than 35 hours each within a period of less than four calendar years.

We understand that some of the medical institutions have arranged their courses of instruction and vacations so that medical students may complete a regular four-year course within a period of approximately three calendar years; although these institutions are not planning to reduce their curriculum. It appears that the shortening of the normal four-year course will be accomplished by the elimination or shortening of vacations.

Section 4 of the Medical Practice Act, the Act of June 3, 1911, P. L. 639, 63 P. S. § 403, provides that a medical institution which is approved by the State Board of Medical Education and Licensure for certification purposes, among other requirements, must "have a graded medical and surgical course of four years each of which shall be of not less than thirty-two weeks of not less than thirty-five hours of each week, of actual work in didactic, laboratory, and clinical study."

While the provisions of the act are not explicit concerning our problem, nevertheless, the meaning of the phrase "four years" may be determined from an application of the general rules of statutory construction.

In *Turbett Township v. Port Royal Borough Overseers of the Poor*, 33 Pa. Super. Ct. 520 (1907), Judge Rice stated:

\* \* \* The effects and consequences of the proposed construction of a law, as well as its reason and spirit, will be looked into in determining the legislative intent, which is the criterion by which all acts must be construed. Hence, if there is room for construction, the court will prefer that construction which is most consonant with the purpose for which the act was passed. \* \* \*

The following statement taken from *Big Black Creek Improvement Company v. Commonwealth*, 94 Pa. 450 (1880), was also quoted with approval in the above case:

\* \* \* "statutes are to be construed so as may best effectuate the intention of the makers, which sometimes may be collected from the cause or occasion of passing the statute, and, where discovered, it ought to be followed with judgment and discretion in the construction, though that construction may seem contrary to the letter of the statute."

The only reported case in Pennsylvania which is enlightening on our particular problem is that of *Keppelman v. City of Reading*, 14 Pa. Dist. 61, 63 (1904), wherein Endlich, J., stated, *inter alia*:

"One year" (no leap year being in question) means a period of 365 days from any given date; i. e., a period, the lapse of which, from a given date in one year, will bring us to the

same date in the next year. That is the popular understanding of the word, and must control in the absence of sufficient apparent reason for holding that another was intended. No doubt a different meaning may be given to the word "year" in statutes, or in contracts where the context or subject-matter points to such intent. Thus, it may appear that a fiscal year is intended: *Glasgow v. Rowse*, 43 Mo. 479, or an official year: *United States v. Dickson*, 15 Pet. (U. S.) 141, or the period intervening between two elections: *Inhabitants of Paris v. Inhabitants of Hiram*, 12 Mass. 262, or a period ending with the fruit season: *Brown v. Anderson*, 77 Cal. 236, and so on. See *Engleman v. State*, 2 Ind. 91; *Knobe v. Baldridge*, 73 Ind. 54; *Thornton v. Boyd*, 25 Miss. 262; *Bartlett v. Kirkwood*, 2 E. & B. 771. But such cases, whether of contract or of statute, are the exceptions which prove the rule, and, as all the authorities show, must be founded on something in the language of the statute or contract, or in its manifest purposes clearly displacing the rule. What is the meaning of the language used in this statute has already been seen. Is there anything in the purpose of the enactment that would warrant a construction of the word "year" in any but its popular and usual sense?

In the Permanent Edition of "Words and Phrases," Volume 45, page 649, under the caption "School Year" we find the courts of other jurisdiction have had occasion to pass upon the meaning of this phrase.

Accordingly, we note that in the case of *Brookfield v. Drurry College*, 139 Mo. App. 339, 123 S. W. 86, 94, it was held:

The word "year," when used in employing teachers, means a college or school year, and not a calendar year.

In *Westerman v. Cleland*, 12 Cal. App. 63, 106 P. 606, 609, it was ruled that:

A contract of a teacher with school trustees to teach one year from July 5, 1899, at a salary of \$1,000, payment to be made by requisitions upon the county superintendent of schools, was a contract to teach for a school "year."

Similarly, in a Georgia case, *Long v. Wells*, 198 S. E. 763, 768, it was held that:

The word "year," in provision in teachers' civil service act that teachers employed for a total period of three years should be automatically reappointed, contemplated "school years," which need not necessarily include "calendar years," or begin on July 1, 1937, the effective date of the statute. Laws 1937, p. 879, § 2.

Probably the strongest authority cited on this particular subject is that of *Williams v. Bagnelle*, 138 Cal. 699, 72 P. 408, 410, citing and adopting *Brown v. Anderson*, 77 Cal. 236, 19 P. 487, wherein it was held that:

The term "year" does not necessarily mean a calendar year. Its meaning is to be gathered from the connection in which the term is used. "The contract was with reference to school-teaching, and, in the absence of anything to the contrary, it must be construed as if the provision of the law limiting the time for which the contract could be made was inserted in it, and that the term 'year' meant a school year, Pol. Code, § 1878, which begins the 1st day of July and ends on the 1st day of June."

It would, therefore, appear that the meaning of the word "year" in section 4, *supra*, is to be ascertained from the context of the language which the legislature used.

The phrase "four years" as used in section 4, *supra*, is apparently subject to two proper interpretations: (1) The legislature intended that the completion of four years of academic work was to be spread out over a period of four calendar years, intending in such a case a relationship of academic years to calendar years, or (2) the term "four years" relates only to academic school years of not less than thirty-two weeks each. In our studied opinion, in view of the authorities hereinbefore cited, it appears clear that in our case the legislature intended that the four years of education in a medical school be acquired in "four school years," and not in "four calendar years."

Because of the present national emergency it is most advantageous for those students attending colleges and universities to complete their courses of study in less than four calendar years, which is the ordinary period of time for the completion of their courses. It is common knowledge that throughout our Commonwealth and nation, colleges, universities, technical schools, medical colleges, and the many other various graduate schools, to meet the demands upon their student personnel during the present emergency, have arranged their courses of study to run through vacations. Under this state of facts students are actually completing four ordinary school years within the shorter period of three calendar years, although they are spending the same amount of time in class work. (Formal Opinion No. 420, dated May 27, 1942.)

One of the prime needs of the present national emergency is the availability of many more medical doctors. The contemplated course of the various medical institutions is directed to help solve this need. The proposed schedule of study will enable medical students to be-

come available for earlier service to our Nation in the present struggle.

We believe that our interpretation is both logical and consistent with the intent of the legislature expressed by the language used in section 4, *supra*. To conclude that the phrase "four years" means "four school years" is not only consistent with the obvious intent of the legislature, but it would also be equally consistent with our prime endeavor in our present daily lives, which is to be the most effective in our every effort that we contribute to our national defense.

It is our opinion that the State Board of Medical Education and Licensure, under the provisions of section 4 of the Medical Practice Act of June 3, 1911, P. L. 639, as amended, July 19, 1935, P. L. 1329, 63 P. S. § 403, may approve a medical institution which allows its students to complete the required graded medical and surgical course of four years, each of which shall be of not less than thirty-two weeks of not less than thirty-five hours each week, within a period of less than four calendar years.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

GEORGE J. BARCO,  
*Deputy Attorney General.*

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OPINION No. 426

*Taxation—Delinquency—Interest—Computation—Penalties—Rate—Fiscal Code of 1929, secs. 806 and 1702, as amended.*

In the settlement of tax accounts, the Commonwealth is entitled to interest upon the additional sums commonly termed "penalties" imposed for delinquency in filing tax and bonus reports under section 1702 of The Fiscal Code of April 9, 1929, P. L. 343, as amended, beginning from the moment the last day for filing such reports elapses, at the rate of six percent per annum until 60 days after settlement, and thereafter at the rate of 12 percent per annum until paid, in accordance with the terms of section 806 of The Fiscal Code.

Harrisburg, Pa., June 8, 1942.

Honorable F. Clair Ross, Auditor General, Harrisburg, Pennsylvania.

Sir: You have requested advice as to whether in the settlement of tax accounts, interest must be charged upon penalties imposed for delinquency in filing tax and bonus reports, and if so, from what date and at what rate.

Obviously, you are referring to those additional amounts provided for in Section 1702 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 P. S. § 1702, which reads as follows:

If any corporation, association, exchange, or person, or the officer or officers of any corporation, association, or exchange, shall neglect or refuse to furnish to the Department of Revenue, within the time prescribed by law, or any extension thereof granted by the Department of Revenue, any bonus or tax report required by section seven hundred six, seven hundred seven, seven hundred eight, seven hundred ten, seven hundred thirteen, seven hundred fourteen, seven hundred sixteen, or seven hundred twenty, of this act, it shall be the duty of the Department of Revenue to add to the bonus or tax of such corporation, association, exchange, or person, for each and every tax period for which such report was not so furnished, the following percentages, which shall be collected with the bonus or tax in the usual manner of settling and collecting such bonus or tax:

On the first thousand dollars of bonus or tax, ten per centum; on the next four thousand dollars, five per centum; and on everything in excess of five thousand dollars, one per centum.

While these added percentages are commonly referred to as penalties, they are not so designated in section 1702, *supra*. To the contrary, section 1702 declares that "it shall be the duty of the Department of Revenue to add to the bonus or tax" a specified percentage for each tax period for which the required report has not been furnished. To this extent the added sum becomes a part of the tax itself with the same effect as if it had been originally assessed as part of the principal amount, and as such the so-called "penalty" must be accorded the same treatment with respect to collection and interest as is meted out to the principal amount of the tax.

This method of construing section 1702, *supra*, is well supported by opinions of our appellate courts. In *Hamilton v. Lawrence*, 109 Pa. Super. Ct. 344 (1933) the problem arose as to the construction to be placed upon that portion of Section 7 of the Act of June 25, 1885, P. L. 187, which provided:

"\* \* \* and all persons, who shall fail to make payment of any taxes charged against them in said duplicate for six months after notice given as aforesaid, shall be charged five per cent additional on the taxes charged against them, which shall be added thereto by said collector of taxes and collected by him."

In a well considered opinion by Judge Keller in which the existing authorities were reviewed, the Superior Court expressed itself at pages 348 and 349 as follows:

While it partakes of the nature of a penalty for delay in the payment of taxes, strictly speaking, it is declared to be an additional sum to be added by the collector to the taxes charged in the duplicate, and collected by him. It becomes a part of the tax, with the same effect as if it had been originally charged in the duplicate, and carries the same incidents. The Supreme Court so decided in the Appeal of the City of Titusville, 108 Pa. 600, 603, where in construing a like provision in the Act of March 18, 1875, P. L. 15, relating to third class cities, and providing that "an additional sum of five per centum shall be added to all the taxes . . . remaining unpaid" after a certain date, it said: "The obvious meaning of the 5th section, above quoted, is that if the tax be not paid on or before September 1st, five per centum thereof shall be added to and become a part of the tax; and, if the tax thus increased be not paid on or before October 1st, a like amount shall be added thereto and form a part thereof, thus increasing the tax, as originally levied, one tenth. This provision was doubtless intended to secure prompt payment of taxes and at the same time save the expense of employing collectors. The same objects are sometimes accomplished by allowing a graduated abatement for prompt payment prior to certain dates, and thereafter adding a certain percentage for delinquency. The 'taxes remaining unpaid,' a detailed statement of which the treasurer is required to prepare and deliver to the city solicitor after the first of January, evidently means the tax originally levied, increased by the addition thereto of the ten per cent. The increase of the tax, thus authorized by the terms of the supplement, is in the nature of interest or damages rather than a penalty, in the strict sense of that word; but, whether it be regarded as damages, for deferred payment, or a penalty, it is very clear that each additional sum of five per cent, becomes a part of the tax which the delinquent taxpayer is required to pay, and to secure which the priority of lien is given."

And in *Harrisburg v. Guiles*, 192 Pa. 191, 201, which involved the amount for which the sureties on a tax collector's bond were liable, Judge McPherson of the Court of Common Pleas of Dauphin County, in an opinion which was approved by the Supreme Court (p. 206, referring to assignment of error 8), said: "It is to be noticed that sections 8 and 9 of the act of 1889 expressly make a collector *prima facie* liable for the amount of tax charged in the duplicate. This is the sum for which he becomes liable when he accepts the duplicate, and this is the obligation of the sureties on the bond. The word 'tax,' however, includes the penalty, which by force of the statutes becomes a part of the tax: *Com. v. Scott*, 7 Pa. C. C. R. 409; *Titusville's Appeal*, 108 Pa. 600." It is true that Judge McPherson used the colloquial

term "penalty," but the important part of his decision was that the additional five per cent becomes part of the tax.

In addition the Superior Court considered the question of whether or not interest could be charged upon the additional sum, and at page 350 of the opinion unhesitatingly declared that:

(2) We have no doubt that under both the Act of 1929 (Sec. 13) and the Act of 1931 (Sec. 16), as well as under prior legislation, interest was due and payable on delinquent taxes after the year in which they were assessed and levied. As the five per cent added for delay in payment became part of the taxes to be collected, we are of opinion that it likewise bears interest beginning the first day of January following its assessment and levy.

These authorities are conclusive in the present situation and, therefore, the additional amounts, or so-called "penalties" imposed by section 1702 are to be regarded, not as separate items, but as inseparable portions of the principal tax and the whole treated as such with relation to the charging of interest thereon and the procedure of collection.

With respect to the rate of interest to be charged and the date from which such interest is to be computed, Section 806 of The Fiscal Code, *supra*, 72 P. S. § 806, provides as follows:

All tax and bonus due the Commonwealth, as provided by law, shall bear interest at the rate of six per centum per annum from the date they are due and payable until sixty (60) days after settlement, and thereafter at the rate of twelve (12) per centum per annum until paid, except that any taxes or bonus due as a result of an appeal to the court of common pleas or any appellate court, shall bear interest at the rate of six (6) per centum per annum from the date such tax is due and payable until paid. The payment of interest, as aforesaid, shall not relieve any person, association, or corporation, from any of the penalties or commissions prescribed by law for neglect or refusal to furnish reports to Department of Revenue, or to pay any claim to the Commonwealth from such person, association, or corporation.

Since we have already determined that the amounts added by section 1702, *supra*, become part of the taxes to be collected, we have no hesitation in declaring that such additional sums shall bear interest at the rate of six (6) per centum per annum from the date they are due and payable until sixty (60) days after settlement, and, thereafter, at the rate of twelve (12) per centum per annum until paid.

The reasoning thus far advanced can be buttressed by considering the problem from another angle. You will observe that section 1702, *supra*, provides that the additional amounts imposed for failure to

file the required tax and bonus reports within the time limits prescribed by statute "shall be collected with the bonus or tax in the usual manner of settling and collecting such bonus or tax." The use of the word "with" indicates that the amounts added by section 1702, *supra*, shall be taken together with the tax or bonus and the two sums collected as one through a uniform system of procedure. Thus, those provisions relating to the running of interest would apply to the additional amounts as well as to the principal amount of the tax or bonus.

In addition, the fact that those so-called "penalties" are, under section 1702, *supra*, to be collected in the usual manner of settling and collecting bonus or tax leads us to an examination of Article VIII of The Fiscal Code, *supra*, 72 P. S. § 801, et seq., which furnishes the procedure for the settlement of taxes and bonus due the Commonwealth. As part of this procedure, provision is made in section 806, quoted *supra*, for interest upon taxes and bonus due the Commonwealth. Since the penalties imposed for failure to file tax and bonus reports are to be collected in the same manner as accounts for taxes and bonus due the Commonwealth are settled and collected, and since the procedural legislation covering the settlement and collection of such taxes and bonus provides for the running of interest as set forth in section 806, *supra*, it follows that section 806, *supra*, applies also to those additional amounts which by the language of section 1702, *supra*, are to be collected by settlement. Accordingly, we again reach the conclusion that such additional amounts shall bear interest at the rates and from the dates set forth in section 806, *supra*.

This brings us to consideration of the problem of determining upon what date the so-called "penalties" imposed by section 1702, *supra*, become due and payable. Section 1702, *supra*, refers to those tax and bonus reports required by Sections 706, 707, 708, 710, 713, 714, 716, and 720 of The Fiscal Code, 72 P. S. §§ 706, 707, 708, 710, 713, 714, 716, 720, and these latter sections specify what type of report is required to be filed and the date upon which it must be filed. Obviously a penalty is incurred and attaches as of the very moment the last day for filing such reports has elapsed without the taxpayer having filed the required report. From that moment forward the delinquent taxpayer is liable to the Commonwealth in the amount specified in section 1702, *supra*.

You will observe that the amount to be added to the tax or bonus under section 1702, *supra*, is not a sum certain, but consists of a percentage of the tax or bonus, and consequently the exact amount of the sum to be added to the tax or bonus cannot be determined until the amount of the tax or bonus itself is finally adjusted and settled.

However, this fact will not prevent the running of interest upon the additional amount from the very first day upon which the required tax or bonus report becomes overdue. In *Commonwealth v. Southern Pa. Bus Co.*, 339 Pa. 513 (1940) the Supreme Court considered whether the Commonwealth might lawfully charge interest at the rate of six percent upon the amount of any tax deficiency discovered at settlement, for the period from the due date of the tax to the date of payment. At pages 530 and 531, the Supreme Court resolved the doubt in the following manner:

\* \* \* We think it is clear that where the legislature has the power to levy a tax, it has the correlative power to impose interest charges upon delinquent payments as a means of enforcing prompt compliance with the law. See *Fox's Appeal*, supra; *Cooley on Taxation* (4th Ed.) Vol. III, p. 2535.

Defendant contends, however, that as the taxpayer has no notice of the deficiency until it has been ascertained at settlement, the imposition of an interest charge for the period prior thereto constitutes a deprivation of property without due process of law. The error in this contention is that it assumes the deficiency is not due until it has been settled by the fiscal officers of the Commonwealth and the taxpayer has been notified thereof.

The amending acts of 1937 require that the taxpayer shall pay the amount of its capital stock tax in full at the time of filing the report. It cannot be assumed that its obligation is limited to the amount set forth in its return, subject to a possible enlargement at settlement. The purpose of the legislature to obtain immediate payment of the whole tax would be defeated if a corporation should thus be permitted to withhold, by error or design, any portion of the tax during the interval between assessment and settlement.

This language is equally controlling in the present instance with respect to those additional amounts imposed by section 1702, supra, in so far as it may be contended that since the amount of the so-called penalty cannot be determined until settlement is made, the date of the settlement constitutes the day upon which the penalty becomes due and payable. This is especially true in view of the fact that under the decision in *Hamilton v. Lawrence*, supra, the additional amounts imposed by section 1702, supra, are not regarded as penalties but are looked upon as constituting a part of the tax or bonus itself.

The Fiscal Code is primarily a collection of legislative enactments creating certain agencies and providing methods for the collection of taxes and other accounts due the Commonwealth. As such it is wholly procedural in nature and all of its provisions are, therefore, in *pari materia*. Consequently, it is necessary that the provisions of The

Fiscal Code be interpreted in such a manner as to effect a harmony and uniformity of procedure. Such a result has been achieved in the present instance with regard to the settlement of tax accounts. Once settlement of the tax account has been made the rate of interest will be identical as to both the principal amount and the additional amounts imposed by section 1702, supra. In addition, such interest can be computed upon both the principal and additional amounts beginning as of the same day since the penalty for failure to file required tax or bonus reports is incurred at the very moment when the principal amount of the tax becomes overdue (See Act of April 9, 1929, P. L. 343, section 805, as amended, 72 P. S. § 805 (c)).

Accordingly you are advised that the Commonwealth shall, in the settlement of the tax accounts, collect interest upon penalties imposed for delinquency in filing tax and bonus reports, beginning from the moment the last day for filing such reports elapses at the rate of six per centum per annum until sixty days after settlement, and thereafter at the rate of twelve per centum per annum until paid.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

FRANK A. SINON,  
*Deputy Attorney General.*

MARTIN J. COYNE,  
*Assistant Deputy Attorney General.*

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OPINION No. 427

*Mental institutions—Counties, cities and institution districts—Transfer of such institutions to the Commonwealth—Act of September 29, 1938, P. L. 53, construed.*

The Act of September 29, 1938, Special Session, P. L. 53, which transferred to the Commonwealth all buildings and other property acquired or erected by any county, city or institution district for the care, maintenance and treatment of mental patients, also transferred to the Commonwealth the buildings and property of all such institutions regardless of whether the actual legal title to such property may have been vested in the various wards, boroughs and townships, and without any liability whatever on the part of the Commonwealth to assume the obligation for the payment of rentals heretofore paid by the institution districts to the various municipalities holding such title to the property of such institutions.

Harrisburg, Pa., May 29, 1942.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: The Department of Justice has received your request for an opinion interpreting certain provisions of the Act of September 29, 1938, P. L. 53, 50 P. S. § 1051, et seq., relating to institutions of counties, cities and institution districts, for the care, maintenance and treatment of mental patients; providing for the transfer of such institutions to the Commonwealth; providing for the management and operation or closing and abandonment thereof, and the maintenance of mental patients therein.

You state that in order that the transition from local to State operation of the mental institutions involved may be effected both in compliance with the new law and with the fewest practical difficulties, you desire to be advised concerning the application of the act to the peculiar circumstances attending the ownership and operation of the mental institutions located in Lackawanna and Luzerne Counties.

In support of your request, you have submitted the following statement and inquiries:

The first paragraph of section 1 of the act provides for the transfer of buildings acquired or erected for mental patients, together with personal property and lands in connection therewith; except that buildings and lands used for indigent persons are not thereby transferred.

The second paragraph of section 1 of the act relates to the division of the farm and woodlands between the Commonwealth and the institution district on the basis of the ratio of indigent persons to the total patient population of the institution.

The third paragraph of section 1 of the act provides that where auxiliary structures and facilities furnishing light, heat, power, water, laundry, kitchen, sewage treatment services and coal supply are so transferred to the Commonwealth, it shall thereafter continue to furnish the institution district with such services at the actual cost thereof to the extent hereafter requested by the institution district.

It will be observed that the act transfers to the Commonwealth all buildings acquired or erected by any county, city, or institution district.

The difficulty arising in Lackawanna and Luzerne Counties is occasioned by the fact that title to the four mental hospitals in those counties is vested in various wards, boroughs, and townships, and that

prior to the act they were in the possession of the institution districts as lessees on a rental basis for the purpose of operating the mental hospitals.

Prior to the County Institution District Law of June 24, 1937, P. L. 2017, 62 P. S. § 2201, there were in Lackawanna County twenty-one independent poor districts, established by various local acts of assembly. Of the said twenty-one districts, three had built, established and maintained large and well-equipped institutions for the care of indigent persons and mental patients: The Hillside Home and Hospital, of the Scranton Poor District; the Blakely Home, of the Blakely Poor District; and the Ransom Home and Hospital, of the Jenkins-Pittston Poor District. By this act of 1937, the independent poor districts were abolished, but the title to the property that had been paid for by the group of citizens and taxpayers who made up each of said poor districts was vested in the same group by a transfer thereof to the municipalities that had made up and comprised each respective poor district, in proportion to the assessed valuation of each of said municipalities.

Prior to the Mental Institution Act of 1938, *supra*, the Blakely Home was the property of and belonged to the Borough of Blakely and certain adjoining boroughs and townships; the Hillside Home and Hospital belonged in part to the City of Scranton and in part to the Borough of Dunmore; the Ransom Home and Hospital belonged in part to the City of Scranton, the Borough of Pittston, later the City of Pittston, and in part to a group of boroughs.

This peculiar situation existing in Lackawanna and Luzerne Counties gives rise to this request for advice, with special reference to the following questions:

1. May the Commonwealth take over the institutions owned by the various wards, boroughs and townships, under Section 1 of the Act of 1938, P. L. 53, which transfers to the Commonwealth all buildings acquired or erected by any county, city, or institution district, for the care, maintenance and treatment of mental patients?

2. It has been suggested that the Commonwealth take over Hillside Hospital as a mental institution and remove thereto the mental patients at Ransom Hospital and Blakely Home, and remove the indigent persons at Hillside Home to the Ransom and Blakely Homes. Such arrangement would result in the Commonwealth's taking the buildings presently in use at Hillside for indigent persons, and the acquisition by the Commonwealth of less than its proportionate share of farm and woodlands described in the second paragraph of section 1 of the act, thereby giving rise to the following further questions:

(a) Is the Commonwealth entitled to take over the indigent buildings and property at Hillside Home?

(b) Is the Commonwealth entitled to take less than its proportionate share of the farm and woodlands?

3. Are leasehold interests, as such, held by the institution districts transferred to the Commonwealth by the act, thereby entitling or obligating the Commonwealth to assume the payment of rentals heretofore paid by the institution districts to the municipalities holding title to the property of such institutions?

4. Is the Commonwealth entitled to the interests of the cities in the mental hospital properties; so that if the Commonwealth were obliged to rent these institutional buildings and property on a basis separate and distinct from the act, if possible, would it be required to pay any rentals for that portion of the value of the buildings and property represented by the interests of the cities?

5. If the Commonwealth is obligated to pay the rentals heretofore paid by the institution districts, as of what date would the Commonwealth's obligation to pay rent commence?

6. By what method could such rentals be apportioned?

7. Should the same rule as to payment and apportionment of rentals on the real estate apply to rentals on the personal property?

The foregoing request for advice requires an interpretation of the Act of September 29, 1938, Special Session, P. L. 53, 50 P. S. Section 1051, et seq., as amended by the Act of May 25, 1939, P. L. 193, 50 P. S. §§ 1053, 1057.

The title of said act is as follows:

#### AN ACT

Relating to institutions of counties, cities and institution districts for the care, maintenance, and treatment of mental patients; providing for the transfer of such institutions to the Commonwealth; providing for the management and operation or closing and abandonment thereof, and the maintenance of mental patients therein, including the collection of maintenance in certain cases; providing for the retransfer of certain property to institution districts under certain circumstances; conferring and imposing upon the Governor, the Department of Welfare, the courts of common pleas and counties, cities and institution districts certain powers and duties; prohibiting cities, counties and institution districts from maintaining and operating institutions, in whole or in part, for the care and treatment of mental patients; and repealing inconsistent laws.

The first paragraph of section 1 of the act, providing for the transfer to the Commonwealth of buildings acquired or erected for mental patients, together with personal property and lands in connection therewith is, in part, as follows:

\* \* \* All buildings acquired or erected by any county, city or institution district for the care, maintenance and treatment of mental patients, the personal property within such buildings or incidental thereto, and any and all other grounds and lands connected therewith or annexed thereto, are hereby transferred to and vested in the Commonwealth of Pennsylvania, \* \* \*.

This section excepts buildings and lands used for indigent persons, as follows:

\* \* \* except that where any such buildings for mental patients are operated in conjunction with buildings dedicated to the care and maintenance of indigent persons who are not mental patients, the buildings used for the care of such persons, the land actually occupied by such buildings, the lands or yards presently set apart for the use of the indigent persons cared for in such buildings, and the lands necessary for ingress and egress thereto and therefrom, shall not be deemed to be hereby transferred, but shall remain vested in the county, city or institution district as theretofore.

The act has been held constitutional in the case of *Chester County Institution District et al. v. Commonwealth et al.*, 341 Pa. 49 (1941).

It will be necessary to bear in mind the foregoing general provisions of the act in order to carry out all of its provisions as required by the Statutory Construction Act of May 28, 1937, P. L. 1019, Section 51; 46 P. S. § 551, which provides, inter alia:

\* \* \* Every law shall be construed, if possible, to give effect to all its provisions.

Your request for advice appears to present situations not entirely covered by the express language of the act, and as stated in the opinion of the Supreme Court in the *Chester County* case, *supra*, at page 58:

\* \* \* The problem was not simple in its elements. \* \* \*

In discussing the difficulty involved in separating the property used for the poor from that used for mental patients, the Court, in the *Chester County* case, *supra*, at page 59, held:

\* \* \* As the Commonwealth was not taking over the operation of all these institutions but only the mental health hospitals, it became necessary to provide for the application of the law as the facts might require. No complaint

therefore can be sustained merely because of difficulty in separating the property used for the poor from that used in the mental health cases. If the Commonwealth may take all, it may take part. \* \* \* The legislature, having declared that all the property devoted to care of mental health cases should be taken, and that the Commonwealth should thereafter perform the service, might have retained all the property devoted to that purpose and there is nothing in the Act which prevents the Commonwealth from retaining all of it. It was unnecessary in this Act to provide to return any part of it.

The Supreme Court, in the Chester County case, *supra*, at page 58, further said:

\* \* \* It is well to have clearly in mind what was enacted. The legislature took from the institution districts throughout the state, created by the Act of 1937, *supra*, the power to operate hospitals for indigent mentally ill persons and declared the Commonwealth would thereafter perform that service, and, in order to perform it, took from the institution districts existing hospital properties. \* \* \*

The foregoing excerpt from the opinion of the Supreme Court plainly states that the Commonwealth took from the institution districts the hospital properties, and not merely leasehold interests therein.

While it is true that the act takes from the institution districts certain property, nevertheless, the institution districts are also relieved of the burden of caring for its mental patients, and the taxpayers will probably pay less than they paid before for the care of mental patients.

The Supreme Court, in the Chester County case, *supra*, at page 64, held:

The taxpayers joining in the bill show no ground for equitable relief; there is not even an averment that their taxes will be increased; if the state takes over the operation and pays the bills the taxpayer plaintiffs will probably pay less, for the purpose, than they paid before. So far as the averment of irreparable damage is concerned, it is sufficient to say that the legislature had the power to pass the Act; presumably, the legislature gave adequate consideration to the effect on the taxpayers of the county; we find nothing authorizing the Court to say that the legislature exceeded its power on the ground suggested.

The Court further held, at page 57:

\* \* \* Within constitutional limitations not involved in the case, the Commonwealth has absolute control over such

agencies and may add to or subtract from the duties to be performed by them, or may abolish them and take the property with which the duties were performed without compensating the agency therefor: \* \* \*

This language clearly indicates that there is no obligation resting upon the Commonwealth to pay rentals for the mental hospital properties.

The primary question raised by your request is whether buildings and other property used for mental patients are transferred to the Commonwealth in cases where the title or ownership of such property was vested in wards, boroughs, and townships, and not in the counties, cities, or institution districts referred to in the act.

It will be noticed that, by the terms of the act,

All buildings acquired or erected by any county, city, or institution district for the care, maintenance and treatment of mental patients \* \* \* are hereby transferred to and vested in the Commonwealth \* \* \*.

The transfer to the Commonwealth is not predicated upon the fact that title to or the ownership of such buildings may have been vested in any county, city or institution district.

Conceding, for the purposes of this opinion, that the buildings may not have been erected by any county, city or institution district for the express purposes of the care, maintenance and treatment of mental patients, it remains to be ascertained whether they were acquired for such purposes.

As stated, title to the four mental hospitals in Lackawanna and Luzerne Counties was vested in the various wards, boroughs, and townships, and prior to the act under discussion they were in the possession of the institution districts as lessees on a rental basis for the purpose of operating the mental hospitals.

In its primary sense, the word "acquired" is used to refer to ownership; yet it may also be used in the sense of obtaining or procuring: 1 C. J. 908.

"Acquired" is defined as to get, procure, secure, acquire; and "obtained," as to get, obtain, attain; and "acquisition," as act of acquiring or gaining property, that which is acquired or gained, especially a material possession obtained by any means. *Jones v. State*, 72 S. W. 2d 260, 263, 126 Tex. Cr. R. 469: 1 W. & P. 649.

Under lease providing for renewal of sub-lease unless landlord shall have "acquired" property and shall have filed plans for erection of new building, word "acquired" was not in-

tended to mean "acquire in fee," but referred only to acquisition of such interest in property as would put landlord in position to erect a new building. *Harris v. Bedell Co.*, 226 N. Y. S. 513, 519, 222 App. Div. 467: 1 W. & P. 640.

Acquire \* \* \* to gain by any means \* \* \*: Webster's New International Dictionary, 2d edition.

From this viewpoint, it must be found that the properties held by the institution districts for the care, maintenance and treatment of mental patients were transferred by the act, even though the legal title in fee to the properties may have been held by the various municipalities.

The purpose of the act is complete State care and maintenance of indigent mentally ill persons, mental defectives and epileptics, as set forth in the preamble of the act, as follows:

Whereas, Experience has proven that the care and maintenance of indigent mentally ill persons, mental defectives and epileptics should be centralized in the State Government in order to insure their proper and uniform care, maintenance, custody, safety and welfare; and

Whereas, Complete care for such persons in institutions operated exclusively by the State Government will effect great economies for municipal subdivisions.

To hold that mental institutions owned by counties, cities or institution districts were transferred to the Commonwealth by the act, but those institutions in which title to the properties was held by other municipal subdivisions are not transferred, would defeat the very purpose of the act. If the act charges the Commonwealth with the care, maintenance and treatment of mental patients in such institutions, but does not transfer the buildings in which such patients are so maintained, the result would be that the Commonwealth would acquire mental patients but no title to the property, and the municipal subdivisions would still retain the ownership of such property, without mental patients, and with no present power or duty in the Commonwealth to utilize such property for the care of mental patients.

This result would constitute such an absurdity as the legislature seeks to avoid under the provisions of The Statutory Construction Act of 1937, P. L. 1019, 46 P. S. 552, as follows:

\* \* \* the Legislature does not intend a result that is absurd, impossible of execution or unreasonable.

Further, it is obvious that the act prohibits the municipalities in Lackawanna and Luzerne Counties from operating the mental institutions.

It is conceded that the care of mental patients is a governmental function and that property used therefor is used in a governmental capacity. The Supreme Court has long since ruled that the care of the mentally ill is a governmental duty.

The Mental Health Act of July 11, 1923, P. L. 998, *supra*, allowed mental patients to be cared for in county, municipal and incorporated institutions.

Carrying out the theory of complete State care for mental patients, the Act of October 11, 1938, Special Session, P. L. 63, 50 P. S. § 21, in Section 1 thereof, amending Section 201 of the Mental Health Act of July 11, 1923, P. L. 998, *supra*, provides that mental patients in the Commonwealth shall be cared for in certain named then existing hospitals, "and in addition thereto, in any other institution taken over by the Commonwealth by law for operation and management as a State hospital for mental diseases"; and in semi-State or private institutions.

The conclusion that the act of 1938 transfers to the Commonwealth the mental institutions in these two counties is a wide departure from the theories advanced in the Dauphin County Court and in the Supreme Court. One of the principal arguments against the constitutionality of the act was that under the language of the act, mental institutions owned by wards, boroughs and townships were not enumerated as having been specifically transferred to the Commonwealth by the act. However, as previously stated, the act has been held constitutional in the Chester County case, *supra*.

Accordingly, we are impelled to the conclusion that these institutions were transferred to the Commonwealth, in which event the Commonwealth is not obligated to pay rents to the municipalities any more than is the Commonwealth obligated to assume the bonded indebtedness or other obligations which may exist in some cases created by the local communities for the construction or operation of mental hospitals.

With these conclusions, it becomes unnecessary to discuss the remaining questions included in your request for advice.

Any other conclusions would result in an anomalous situation with regard to the costs of the care and maintenance of mental patients.

Section 2 of the act prohibits the counties, cities or institution districts from thereafter operating or maintaining, in whole or in part, any institution for the care of mental patients.

Until June 1, 1941, the costs of the care and maintenance of mental patients in mental hospitals maintained wholly or in part by the

Commonwealth were borne by the counties or poor districts or municipalities which were liable for their support and by the Commonwealth in the proportion fixed by law.

This responsibility relates to the Act of April 25, 1929, P. L. 707, No. 305, Section 1, as amended by the Act of June 1, 1931, P. L. 300, Section 1, as amended by the Act of May 23, 1933, P. L. 975, Section 1, 50 P. S. § 624.

The act of 1929, *supra*, as amended, provided, *inter alia*, as follows:

The part of the cost of the care and maintenance, including clothing, of the indigent insane, whether chronic or otherwise, in the State hospitals for the insane, payable by the counties or poor districts, is hereby fixed at the uniform rate of three dollars per week for each person, which shall be chargeable to the county or poor district from which such insane person shall have come, and the amount of the aforesaid cost, over and above three dollars per week chargeable to the counties or poor districts, shall be paid by the Commonwealth: \* \* \*

The foregoing section of the act of 1929, *supra*, and its amendments were repealed by section 2 of the Act of October 11, 1938, Special Session, P. L. 63, 50 P. S. § 21, which placed the ultimate liability for the costs of the care and maintenance of such patients upon the Commonwealth.

The Act of 1938, P. L. 63, *supra*, amended the Mental Hospital Act of July 11, 1923, P. L. 998, and Section 503 thereof, 50 P. S. § 143, was amended to read as follows:

Whenever any mental patient is admitted, \* \* \* to any mental hospital maintained wholly or in part by the Commonwealth, the cost of care and maintenance, including clothing of such patient \* \* \* if he is financially unable to pay such expenses or any proportion thereof, then such expenses or the proportion thereof which cannot be collected from the patient, or the person liable for his support, shall be paid by the Commonwealth.

This amendatory Act of 1938, P. L. 63, *supra*, became effective June 1, 1939, but the act was subsequently amended by the Act of May 25, 1939, P. L. 195, 50 P. S. § 21, so as to become effective June 1, 1941.

Obviously, the Commonwealth is not liable for the costs of the care and maintenance of the patients in the institutions herein referred to, if those institutions are not State-owned institutions by virtue of having been transferred to the Commonwealth by the act under discussion.

We are of the opinion that the Act of September 29, 1938, Special Session, P. L. 53, 50 P. S. § 1051, et seq., which transferred to the Commonwealth all buildings and other property acquired or erected by any county, city or institution district for the care, maintenance and treatment of mental patients, also transferred to the Commonwealth the buildings and property of all such institutions regardless of whether the actual legal title to such property may have been vested in the various wards, boroughs and townships, and without any liability whatever on the part of the Commonwealth to assume the obligation of the payment of rentals heretofore paid by the institution districts to the various municipalities holding such title to the property of such institutions.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

H. J. WOODWARD,  
*Deputy Attorney General.*

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OPINION No. 428

*Flash floods—Relief of residents of Honesdale, Wayne County—Cost of food and supplies—By whom paid—Act No. 12-A, approved June 16, 1941.*

The costs of food and supplies procured by the representatives of the Department of Military Affairs for the relief of the citizens of Honesdale, Wayne County, Pennsylvania, in the recent flash floods of May, 1942, may be paid by the Department of Military Affairs under the provisions of Appropriation Act No. 12-A, approved June 16, 1941.

Harrisburg, Pa., June 24, 1942.

Honorable Edward Martin, Adjutant General, Department of Military Affairs, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to whether the costs of food and supplies ordered by Deputy Adjutant General, R. M. Vail, at the instance of Honorable Arthur H. James, Governor, for the relief of residents of Honesdale, Wayne County, Pennsylvania, in the recent flash floods of May, 1942, can be paid by the Department of Military Affairs under the provisions of Appropriation Act No.

12-A, approved June 16, 1941, wherein it is provided (p. 24) *inter alia*, as follows:

TO THE DEPARTMENT OF MILITARY AFFAIRS

\* \* \* for the payment of any and all expenses incident to furnishing men, material and equipment to relieve unemployment or drought conditions throughout the State *or when a disaster occurs*; \* \* \* in payment of costs and material expenses by the Pennsylvania National Guard and the Pennsylvania Reserve Defense Corps *in furnishing relief from disaster* \* \* \*. (Italics ours.)

It will be noted that the above-referred to act mentions "disaster" in two places.

As is generally known, there occurred in the latter part of May, 1942, in Wayne County, Pennsylvania, a heavy rain amounting to a cloudburst, as a result of which sudden precipitation of water there followed "flash floods." Creeks, streams and small rivers flowing through Honesdale and Hawley suddenly became raging torrents, the water rose so quickly that many lives were lost, numerous bridges were washed down stream and houses were moved from their foundations. The Borough of Honesdale suffered property damage which has not yet been definitely ascertained, but which has been estimated at over one million dollars. Public buildings were damaged beyond repair. Grocery stores and markets were inundated and the contents completely destroyed. The public was in dire need of food and supplies. In this situation, which was clearly a public disaster, Honorable Arthur H. James, Governor of the Commonwealth of Pennsylvania, ordered out a portion of the Pennsylvania Reserve Defense Corps and authorized the Deputy Adjutant General to purchase food and supplies. The question now arises as to the source of payment therefor.

The legislature in making the appropriation to the Department of Military Affairs clearly had in mind the possibility of a situation of this kind when it mentioned disaster in the two specific instances above mentioned in Appropriation Act No. 12-A, *supra*. The first thing that naturally occurs to the Chief Executive of the Commonwealth in case of a great public disaster arising from flood, fire, hurricane or any other reason is to call upon the military forces of the State to protect the lives and property of its inhabitants affected by the disaster. The Governor in this case did this and because of the lack of food supplies and the danger of pestilence, illness and suffering, authorized the officers of the Pennsylvania Reserve Defense Corps to procure food and supplies and thus prevented pestilence, illness and suffering. This is an expense incident to furnishing relief from disaster and

within the intent of the legislature in the Appropriation Act 12-A, supra.

It is our opinion that the costs of food and supplies procured by the representatives of the Department of Military Affairs for the relief of the citizens of Honesdale, Wayne County, Pennsylvania, in the recent flash floods of May, 1942, may be paid by the Department of Military Affairs under the provisions of Appropriation Act No. 12-A, approved June 16, 1941.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ROBERT E. SCRAGG,  
*Deputy Attorney General.*

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OPINION No. 429

*County offices—McKean County—Prothonotary—Vacancy—Acceptance by elected officer of commission in the United States Army—Right of Governor to appoint—Act of May 2, 1929, P. L. 1278.*

A vacancy exists in the offices of Prothonotary, Clerk of the Court of Quarter Sessions, Clerk of the Court of Oyer and Terminer, and Clerk of the Orphan's Court of McKean County. Such vacancy has existed since the date of the acceptance of a commission by Joseph R. Carvolth, the duly elected holder of said offices, as a Colonel in the United States Army. The Governor has the power to appoint Mr. Carvolth's successor. The official records in the office of the Secretary of the Commonwealth should have a notation made to the effect that Mr Carvolth vacated his said offices by reason of the acceptance of his commission in the United States Army.

Harrisburg, Pa., July 15, 1942.

Honorable Arthur H. James, Governor, Commonwealth of Pennsylvania,  
Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether a vacancy exists in the offices of Prothonotary, Clerk of the Court of Quarter Sessions, Clerk of the Court of Oyer and Terminer, and Clerk of the Orphans' Court, of McKean County, due to the fact that Mr. Joseph R. Carvolth, who was duly elected to fill said offices for a term expiring the first Monday of January, 1944, has accepted a commission as a colonel in the 111th Infantry of the United States Army and is now serving as such.

A prothonotary is a constitutional county officer, as are also the clerks of the above mentioned courts. Article XIV, Section 1, Constitution of the Commonwealth of Pennsylvania. The Act of July 2, 1839, P. L. 559, as amended April 11, 1866, P. L. 763, 17 P. S. § 1430, provides that in the County of McKean one person shall be elected to fill the offices of Prothonotary, Clerk of the Court of Quarter Sessions, Clerk of the Court of Oyer and Terminer, and Clerk of the Orphans' Court. The Act of June 29, 1923, P. L. 944, 16 P. S. § 2431, provides for the compensation of the aforesaid offices in counties of the Sixth Class, of which McKean County is one, and provides further that when one person holds three or more of such offices he shall receive the highest salary fixed for any one thereof plus an additional salary of \$1,000.

You have informed us that the County Commissioners of McKean County have declared the aforesaid offices vacant by reason of the acceptance by Mr. Carvolth of the military commission aforesaid.

Article III, Section 60, of the Act of May 2, 1929, P. L. 1278, as amended June 9, 1931, P. L. 401, 16 P. S. § 60, provides that in case of a vacancy occurring by reason of death, resignation or otherwise, in any county office created by the Constitution or laws of the Commonwealth, where no other provision is made by the Constitution or said act, the Governor of the Commonwealth shall appoint a suitable person to fill such office, who shall continue therein and discharge the duties thereof until the first Monday of January next succeeding the next municipal election which shall occur three or more months after the happening of such vacancy. The appointee shall be confirmed by the Senate, if in session.

Article XII, Section 2, of the Constitution of the Commonwealth, provides as follows:

No member of congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.

As a Colonel of the United States Army Mr. Carvolth holds and exercises an office of trust or profit under the United States. See Commonwealth of Pennsylvania ex rel. Crow v. Smith, 343 Pa. 446 (1942), wherein it was held that a Major in the United State Army holds and exercises an office of trust or profit under the United States within the meaning of the aforesaid constitutional provision.

That the Prothonotary and Clerk of the Courts of Oyer and Terminer, Quarter Sessions and Orphans' Court of McKean County, holds

or exercises an office in this Commonwealth to which a salary, fees or perquisites are attached, is clear.

As indicated above, Article XII, Section 2, of the Constitution of the Commonwealth, expressly forbids one individual to hold an office of trust or profit under the United States and at the same time to hold an office in this State to which a salary is attached. It follows, therefore, that Mr. Carvolth cannot hold a commission as Colonel in the United States Army and also the offices to which he was elected in McKean County.

In speaking of Article XII, Section 2, the Supreme Court of Pennsylvania said in *DeTurk v. Commonwealth*, 129 Pa. 151 (1889), at page 160:

\* \* \* The prohibition may be enforced without legislative aid, and no action or inaction of the legislature can destroy it. \* \* \*

We next inquire whether DeTurk forfeited and created a vacancy in the office of postmaster by accepting and entering upon the duties of the office of county commissioner. In considering this question, regard must be had to the fact that the former is an office under the government of the United States, and the latter an office under the state government. If the titles to these offices were derived from a common source, it might well be held that an acceptance of the second office was an implied resignation and vacation of the first. This is the common law rule, and the current of authority in this country sustains it. But the state cannot declare the federal office vacant, nor remove the incumbent from it. It may, however, enforce the constitutional provision by proceedings to test his title to the office he holds under its laws, and it may remove him from that office if he does not surrender the office he holds under the government of the United States. \* \* \*

Continuing at page 161 the Supreme Court said:

Did his formal resignation and complete surrender of it, [the office of postmaster] before answer, place him in accord with the constitution, and perfect his title to the office of county commissioner? By accepting it, and entering upon its duties, he elected to hold it. This election was confirmed by his express resignation of the office of postmaster, and the appointment of his successor, before issue was joined. When he appeared, in obedience to the mandate of the writ, he was not holding an office of trust or profit under the United States. \* \* \*

The case of *Commonwealth of ex rel. v. Smith*, supra, involved the Mayor of the City of Uniontown who had entered the active

military service of the United States as a Major. The court remarked in footnote 3 as follows:

Ordinarily, one holding two incompatible offices is allowed to elect which he desires to resign; if he declines or neglects to make a choice the court determines which office he should be compelled to relinquish: \* \* \* [authorities]; in the present case, however, there is no choice possible since it is not within the power of relator to resign from his office in the army.

As a result of the foregoing, we are clearly of the opinion that Mr. Carvolth may not and does not hold or exercise the offices to which he was elected in McKean County, and has not held or exercised said offices since his entry into active military service as a Colonel in the United States Army.

It is our opinion that a vacancy exists in the offices of Prothonotary, Clerk of the Court of Quarter Sessions, Clerk of the Court of Oyer and Terminer, and Clerk of the Orphans' Court of McKean County, and that such vacancy has existed since the date of the acceptance of a commission by Joseph R. Carvolth, the duly elected holder of said offices, as a Colonel in the United States Army. We are further of opinion that you have the power to appoint Mr. Carvolth's successor. The official records in the office of the Secretary of the Commonwealth should have a notation made to the effect that Mr. Carvolth vacated his said offices by reason of the acceptance of his commission in the United States Army.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 430

*Insurance—War Damage Corporation policies—Legality of purchase—Protection of State-owned buildings—Appropriation Act No. 12-A of 1941.*

The Department of Property and Supplies may purchase, on behalf of the Commonwealth, policies of insurance, issued by the War Damage Corporation, to protect State-owned buildings. The decision as to whether such insurance will be purchased and the amount thereof is of course for the department. The cost of such insurance is payable out of the funds appropriated to the department by Appropriation Act 12-A of 1941.

Harrisburg, Pa., July 21, 1942.

Honorable James F. Torrance, Secretary of Property and Supplies,  
Harrisburg, Pennsylvania.

Sir: Under date of July 6, 1942, you requested this department to advise you if the Commonwealth of Pennsylvania, through your department, may take out War Damage Corporation policies of insurance to protect State-owned buildings.

The War Damage Corporation is a Federal agency created by the Reconstruction Finance Corporation, pursuant to the provisions of the act covering the said Reconstruction Finance Corporation. The War Damage Corporation will indemnify the insured against direct physical loss of or damage to his property, resulting from enemy attack, including any action taken by the Military, Naval or Air Forces of the United States in resisting enemy attack. This coverage so afforded protects the insured, therefore, from all loss occasioned by war, whether inflicted by the enemy or by our own armed forces.

A state may become an "applicant" for such insurance. The War Damage Corporation regulations, effective July 1, 1942, provide as follows:

The term "Applicant" shall mean any person, public or private, including any individual, partnership, corporation association, State, County, municipality, or other political subdivision, having an insurable interest in property eligible for coverage by policies of insurance issued by the Corporation pursuant to these Regulations and making application to the Corporation for such coverage on the forms of Application prescribed by the Corporation.

But a legal question as to whether or not the Commonwealth may purchase such insurance arises by reason of the Act of May 14, 1915, P. L. 524, 72 P. S. § 3731 et seq. This act creates a fund separate and apart from all other funds of the Commonwealth, to be known as the Insurance Fund. The act provides that there shall accumulate in such fund the sum of \$1,000,000 and that this fund is for the "rebuilding, restoration, and replacement of any structures, buildings, equipment, or other property owned by the Commonwealth of Pennsylvania, and damaged or destroyed by fire or other casualty." (72 P. S. § 3731).

Section 7 of the act makes it unlawful for your department, or any other agency of the State, to purchase, secure or obtain any policy of insurance, the term of which shall extend beyond December 31, 1920. Said Section 7, 72 P. S. § 3737, reads in part as follows:

From and after the adoption and approval of this act, it shall be unlawful for any department, bureau, commission,

or other branch of the State Government, or any board of trustees, overseers, managers, or other person or persons, or custodians of State property to purchase, secure, or obtain any policy of insurance on any property owned by the Commonwealth, the term of which policy of insurance shall extend beyond the thirty-first day of December, Anno Domini one thousand nine hundred and twenty, \* \* \*.

Seemingly, the act of 1915, *supra*, makes it impossible for your department to purchase War Damage Corporation insurance policies for the Commonwealth.

We feel, however, that the legislature never intended such a result. In interpreting the act of 1915, *supra*, we cannot ascribe to the legislature an intention to prohibit the purchase of anything other than the ordinary fire and casualty insurance policies that were then offered to the public by insurance companies. We see, also, only a desire on the part of the legislature to establish a fund from which the ordinary losses resulting from fire or other casualties can be recouped.

In support of our contention that the legislature in 1915 intended only to prohibit the purchase of policies of insurance that were then offered to the public, we first wish to cite the fact that the insurance laws of this Commonwealth in effect in 1915 did not permit fire insurance companies to insure against bombardment, invasion and similar hazards of war. (See Act of June 1, 1911, P. L. 559, now repealed.)

The power to assume such risks was only conferred upon fire insurance companies by the Act of May 24, 1917, P. L. 302, Section 1 of which reads as follows:

Be it enacted, &c., That from and after the passage of this act any joint-stock or mutual fire insurance company, heretofore organized, under any general or special law of this Commonwealth, or which may hereafter be organized, shall, in addition to the powers already possessed, have the power to make insurance against loss or damage, caused by bombardment, invasion, insurrection, riot, civil war or commotion, and military or usurped power.

It is quite patent that the 1917 act, *supra*, was passed because of World War I (1914-1918), this legislation having become effective a few days after the declaration of war by the United States of America.

When the Insurance Company Law of 1921, being the Act of May 17, 1921, P. L. 682, 40 P. S. § 341 et seq., was enacted, fire insurance companies were authorized to make insurances against "loss or damage, caused by bombardment, invasion, insurrection, civil

war or commotion, and military or usurped power." (40 P. S. § 382 (b) (1)).

It is to be noted, of course, that neither the act of 1917, *supra*, nor the act of 1921, *supra*, was in effect when the prohibition against the purchase of insurance policies by your department, or any other agency of the State government, was written into our law in the year 1915.

It would also seem that the coverage afforded by the War Damage Corporation goes beyond anything contemplated by either the act of 1917 or the act of 1921, *supra*, in that it affords protection against damage occasioned even by our own forces in defending against an attack by an enemy.

It happens, also, that under the acts of 1917 and 1921, *supra*, very few insurance companies have ever offered this type of protection. In fact the usual protection afforded by fire insurance companies is given under the standard fire insurance policy, which excludes such hazards. The language of the standard policy provides: (Act of June 8, 1915, P. L. 919, Section 2.)

This company shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; \* \* \*.

The provision of the act of 1915, *supra*, establishing the standard fire insurance policy form was reenacted in the Insurance Company Law of 1921, *supra*, and the language immediately hereinbefore quoted is reenacted verbatim as part of Section 523 of the Act of 1921, *supra*, 40 P. S. § 658.

It is notable that the same legislature (1915 Sessions) which prohibited your department from purchasing certain types of insurance policies, authorized this standard fire insurance policy for the State of Pennsylvania. It is quite evident that the legislature of 1915 was not thinking in terms of war hazards or war risks when it placed upon your department the prohibition under discussion herein.

The prohibition in question is against the purchase of any insurance policy that might protect against damage or destruction by "fire or other casualty." Our previous discussion has dwelt largely upon fire insurance and under the law, and practices and customs of the fire insurance business, fire insurance companies protect against many hazards other than those occasioned by fire. Hazards against which a property owner can obtain protection from a fire insurance company

would include lightning, certain explosion, tornadoes, cyclones, wind storms, and a great number of other similar risks.

Whether the clause "fire or other casualty," quoted *supra*, was meant to include loss from fire and other casualties usual to a fire insurance company, such as lightning, tornadoes, cyclones, etc., or whether it was intended to include the coverages afforded the public by both fire and casualty insurance companies, is immaterial for the purposes of this opinion because casualty insurance companies have never offered to the public the protection afforded by the War Damage Corporation.

Furthermore, while casualty insurance companies are authorized under Section 202 (c) (1) to (11), inclusive, of the act of May 17, 1921, *supra*, to assume risks therein set out, none of such coverages even remotely embrace the undertaking of the War Damage Corporation in its policy of insurance described above.

It is quite evident, therefore, that casualty companies not only do not offer such protection, but our law does not contemplate their offering such protection.

We have also stated above that in interpreting the Act of May 12, 1915, P. L. 524, we find only an intention on the part of the legislature to establish a fund from which ordinary fire or casualty losses may be recouped. In support of this we point to the fact that the limit of the fund established under the act of 1915, is \$1,000,000. Actually the fund at times falls below that figure. While the Commonwealth of Pennsylvania owns several buildings which are today worth more than one million dollars, the possibility of damaging any one such building by the ordinary fire or ordinary casualty to the extent of one million dollars or more, is remote. There is nothing remote, however, about the possibility of damage or destruction to the extent of many millions of dollars to a single building or a group of buildings, by reason of air raids and other activities of modern warfare.

The Act of May 14, 1915, *supra*, has been the subject of two opinions of this department, one by Deputy Attorney General Hull, dated January 13, 1921, and another by Special Deputy Attorney General Schnader, dated January 25, 1928, the latter being known as Opinion II-I and being one of a series of opinions relating to State institutions within the Department of Welfare.

A review of both these opinions discloses that the necessity of insuring State buildings against the unusual hazard or risk attendant upon bombings and other incidents of war, was not considered and we, therefore, feel that anything contained in such opinions which might

limit or prohibit the purchase of insurance or the use of the moneys of the Insurance Fund, is not controlling.

Appropriation Act No. 12-A, enacted by the Session of 1941, appropriates to your department the sum of \$1,880,000 which money is available, in part, "for the care, maintenance and preservation of public grounds and buildings, including the executive mansion." The proper care, maintenance and preservation of public buildings would call for insurance against the risks and hazards of war and the purchase of policies of insurance of the War Damage Corporation would be a proper expenditure for such purposes.

Section 509 of The Administration Code of 1929, being the Act of April 9, 1929, P. L. 177, 71 P. S. § 189, designates your department as the purchasing agency for the Commonwealth for the purchase of insurance such as that here under discussion.

It is, therefore, our opinion your department may purchase, on behalf of the Commonwealth, policies of insurance issued by the War Damage Corporation, to protect State-owned buildings. The decision as to whether or not you will purchase such insurance, and the amount thereof, is of course for your department. Cost of such insurance, should you purchase the same, is payable out of funds appropriated to your department by Appropriation Act 12-A of 1941.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ROBERT E. SCRAGG,  
*Deputy Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

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OPINION No. 431

*Banks and banking—Unlawful practices—Cashing checks—Making change—Making deposits—Paying utility bills—Selling checks—Issuing travelers' checks and money orders—Agent for customer.*

1. Neither the cashing of a check nor the making of change constitutes an activity which, under section 1505 of the Banking Code of May 15, 1933, P. L. 624, is restricted to banking institutions.

2. The receipt of moneys for transmission to a bank for deposit is an activity which, under section 1505 of the Banking Code of 1933, may be carried on only

by a banking institution, even though the recipient is acting as agent for the depositor.

3. Section 1505 of the Banking Code of 1933 prohibits anyone other than a banking institution from acting as agent for the debtor in paying various utility charges such as those for gas, electric, and telephone service, since such transactions involve the receipts of moneys for transmission.

4. Section 1505 of the Banking Code of 1933 prohibits anyone other than a banking institution from giving his check in exchange for money so that the customer may forward the check to another in payment of an obligation.

5. The issuance of travelers' checks or money orders in exchange of money received constitutes an activity which, under section 1505 of the Banking Code of 1933, only a banking institution may perform.

Harrisburg, Pa., July 22, 1942.

Honorable John C. Bell, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to the legality of activities on the part of certain individuals and corporations who have set themselves up to transmit moneys for the customers by some four methods described by you.

Briefly, these activities may be summed up as follows:

1. The establishment of places of business where various services are rendered, including the cashing of checks, the making of change, the depositing, as agent for the customer, of moneys in the customer's bank, and the obtaining of a notation in the passbook or other receipt showing the entry of such deposit.

2. The acting as agent for the purpose of paying various utility charges, such as gas, electric and telephone bills.

3. The offering to their customers of checks in exchange for money, in order to permit the customer to forward such checks to others in payment of various and sundry obligations. You compare this to a banking institution selling its cashier's checks, or money orders.

4. The offering to issue their own checks but styling the same as money orders or travelers' checks, in exchange for money received from the customer.

In practically every case the party offering such service to the public describes his or its status as that of agent solely of the customer, and not as agent for the bank or utility, or other recipient of the money or check.

In general, your inquiry is, as stated above, whether or not such transactions may be legally conducted by agencies other than regular

banking institutions. If not, it follows, of course, that the individuals or corporations engaging in such activities are invading the banking field, and the public in dealing with such agents does not enjoy the protection which is afforded in its dealings with regular banking institutions.

Section 1505 of the Banking Code, being the Act of May 15, 1933, P. L. 624, 7 P. S. § 819-1505, provides, in part, as follows:

A. The only corporations or persons who shall be authorized to engage *in the business of receiving moneys* in this Commonwealth *for deposit or for transmission*, or to establish in this Commonwealth a place of business for the purpose of receiving moneys *for deposit or for transmission*, shall be banks, bank and trust companies, savings banks, and private banks. (Italics ours.)

It is to be noted that the section above quoted emphasizes the receipt of money for (1) deposit, or (2) transmission. It will be necessary, therefore, in disposing of the questions raised by your inquiry to determine if the particular transaction involves the receipt of money for deposit or transmission.

We will dispose of the four situations above described, serially:

1. You describe the first activity as embracing such services as the cashing of checks, the making of change and the carrying to a bank of a deposit for the customer, bringing back the passbook or other receipt showing that the deposit is duly accredited.

Neither the cashing of a check nor the making of change would appear to be an exclusive feature of the banking business, nor do such activities necessarily involve deposit or transmission of money. The acceptance of money for the purpose of depositing the same in a bank, on the other hand, does involve the transmission of money. The legislature certainly has expressed an intention that only banks shall receive and transmit moneys as a regular business. It is our conclusion that the receipt of moneys to the end that they be transmitted to a bank for deposit, is within the prohibition of section 1505, *supra*.

2. The second activity embraces a system whereby utility bills are paid. We presume this could extend to the payment of insurance, taxes, or other obligations where a statement is regularly received.

Undoubtedly this transaction involves the receipt of money for transmission and we feel that this activity is prohibited by section 1505, *supra*. The fact that the individual or corporation which establishes the business is acting as agent for the party who seeks the

service, and not as agent for the utility, would make no difference in our opinion because the prohibition is against the act of receiving and transmitting the money by anyone except one of the banking institutions referred to in section 1505.

3. The third activity embraces the transaction wherein the customer obtains from the corporation or person offering such service, the check of the corporation or the person, in exchange for money, so that the customer may forward such check to others in payment of various and sundry obligations.

You point out that this is similar to banking institutions selling money orders, cashiers' checks and other evidences of deposit. You suggest that perhaps this transaction constitutes the engaging in the banking business.

As we view this type of transaction, however, there is still a receipt of moneys for transmission. While we do not accuse anyone of subterfuge, it would seem that the service rendered is fundamentally no different than the case wherein the money is actually received and transmitted, with or without check, to the one to whom the customer owes an obligation. The mere fact that the check is turned over to the customer for delivery to the third party hardly changes the nature of the transaction. Such activity is prohibited.

We need, therefore, not go into the question of whether or not the issuance of such checks constitutes engaging in the banking business, but it is worthy of note that the term "banking" as defined in the Banking Code, 7 P. S. § 819-2, includes receiving of money for deposit or for transmission.

4. The transaction described as four above apparently does not differ greatly from that described as two and three. The only variation seems to be that instead of issuing checks the corporation or person offering such service issues what are termed travelers' checks or money orders in exchange for money received. As recited hereinbefore, we feel that this constitutes a receipt of money for transmission and the same, therefore, is prohibited.

In summary, it is our opinion and you are, therefore, accordingly advised as follows:

1. A corporation or a person not authorized by Section 1505 of the Banking Code, 7 P. S. § 819-1505, may not engage in the business of receiving moneys for transmittal to a customer's bank.

2. The somewhat similar activity of receiving money for the purpose of paying utility bills, is also prohibited.

3. An operation varied only by the fact that the customer is given the check of the corporation or person establishing such a business, in order to permit the customer to forward such check to others, is likewise prohibited.

4. The issuance by a corporation or a person of its own, or his own check for the purpose of transmitting the same, is prohibited even though the checks may be styled as money orders or travelers' checks.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

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OPINION No. 432—Recalled

OPINION No. 433

*Requisitions—Pennsylvania Board of Parole—State Parole Act of August 6, 1941, P. L. 861—Constitutionality—Right of Auditor General to issue pay roll warrants pending decision of the Supreme Court.*

The Auditor General may lawfully draw warrants for pay roll and other requisitions presented by the Pennsylvania Board of Parole until the Supreme Court has declared the Act of August 6, 1941, P. L. 861, unconstitutional or until otherwise advised by the Attorney General.

Harrisburg, Pa., July 28, 1942.

Honorable F. Clair Ross, Auditor General, Harrisburg, Pennsylvania.

Sir: By your communication of July 24, 1942, you have requested us to advise you whether, in view of the decision of the Court of Common Pleas of Delaware County on July 21, 1942, that the Act of August 6, 1941, P. L. 861, commonly called the State Parole Act, is unconstitutional, you may lawfully draw warrants on pay roll and other requisitions presented to you by the Pennsylvania Board of Parole, pending final determination by the Supreme Court of Pennsylvania of the validity or invalidity of the act.

Section 37 of the State Parole Act appropriates \$400,000 or so much thereof as may be necessary to the Pennsylvania Board of Parole for the biennium ending May 31, 1943, for the payment of all expenses deemed necessary and proper by the board. The funds, therefore, are available wherewith to pay the requisitions in question.

In the State of Washington *ex rel. Coulter v. Yelle*, 183 Wash. 691, 49 P. (2d) 465 (1935), the question arose whether an employee of the Department of Agriculture of Washington could be paid for services rendered under a statute declared invalid by the Supreme Court of Washington. The act invalidated contained an express appropriation for such expenses which was not exhausted. This is the situation that obtains under the State Parole Act. The Supreme Court of Washington held that the appropriation was valid, even if the statute under which the employee was hired was not, and that payment could and should be made. We feel concerning the question presented by you as did the Supreme Court of Washington in the case reviewed.

Furthermore, the presumptive validity of an Act of the General Assembly of the Commonwealth is not, in our opinion, overcome by the decision of an inferior court. And this is so especially when we do not agree with such decision, as is the case here. The decision of the Delaware County Court does not bind the Commonwealth, the Pennsylvania Board of Parole, or you, in so far as the question involved is concerned. The board, you, and the Commonwealth, are entitled to have the constitutionality of the State Parole Act passed upon by our court of last resort, and that court is the Supreme Court of Pennsylvania. To the end that this may be accomplished without delay we have instructed the District Attorney of Delaware County immediately to appeal to the Supreme Court the decision of the Delaware County Court.

We appreciate the fact you are under bond and forbidden by law from authorizing the payment of any money not lawfully appropriated. However, under Section 512 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, since you have requested our advice in the premises, and we have given it, you are not liable for following such advice, upon your official bond or otherwise.

It is our opinion, therefore, that you may lawfully draw warrants for pay roll and other requisitions presented to you by the Pennsylvania Board of Parole in accordance with the provisions of the State Parole Act, the Act of August 6, 1941, P. L. 861, until the Supreme Court of Pennsylvania has declared said act unconstitutional, or until otherwise advised by us.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

## OPINION No. 434

*Physicians and surgeons—Approved medical colleges—Status of student interns—Opinion No. 399 reviewed.*

1. A graduate of an approved medical college, who has served one year as an intern in a hospital approved for intern training and who has failed to pass his examination before the State Board of Medical Education and Licensure may act as a student intern in any incorporated hospital or State hospital, whether or not approved for intern training, if he has not failed his State board examinations more than once. In case the intern has failed to pass his State board examination the second time, then it is necessary for him to enter an approved medical school de novo and satisfactorily complete a year of approved post-graduate study, in order to qualify for another examination leading to licensure.

2. A graduate of an approved medical college, before or after serving his one-year internship, as a student intern, in a hospital approved for intern training, may serve as a student intern in any incorporated hospital or State hospital, approved for intern training, even though he is not pursuing a medical specialty course, as long as he is under the supervision of the medical or surgical staff of the hospital.

3. The Act of July 10, 1935, P. L. 645, 53, requires hospitals receiving State-aid appropriation to have in attendance at all times either a licensed physician or a resident or student intern, who must be, however, under the supervision of the medical or surgical staff of the hospital, provided, however, that if the Secretary of Welfare determines that during the continuation of a state of war between the United States and any foreign country and for six months thereafter that the constant attendance of a licensed physician or resident intern cannot be secured by such a hospital because of the war emergency, he is not required to withhold any appropriations which may be due the hospital.

Harrisburg, Pa., August 10, 1942.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: On July 8, 1941, this department issued Formal Opinion No. 399 in response to your request for advice on a number of questions relating to medical interns.

Formal Opinion No. 399 disposed of only one question, the remaining questions being left for a separate and later opinion. We submit herewith our opinion which will dispose of the other questions which you have raised as to the status of interns.

It was held in Formal Opinion No. 399 that a student intern may continue to serve as such in a hospital from the time he takes his examination for licensure until such time as he is notified of the results of his examination. The situation with which that opinion dealt arose because the State Board of Medical Education and Licensure had refused to allow interns to continue in such service in a hospital from the end of the intern year, which is approximately July 1, until the

results of their examinations were learned. This period would approximate ninety days, and the effect of the ruling of the State Board of Medical Education and Licensure was that for this ninety-day period the particular student intern could not practice medicine because he had not been advised as to the result of his examination; and since he was not licensed he could not continue in the hospital as an intern because his year of internship was completed.

It is to be noted that Formal Opinion No. 399 holds that there is no reason for such intern not being permitted to serve for this period of approximately ninety days, but Formal Opinion No. 399 goes no further than to advise you that he may so serve "until such time as he is notified of the results of his examination," although we discussed the general subject of interns in detail.

The remaining questions may be stated as follows:

1. Where a graduate of an approved medical college serves one year as an intern in a hospital approved for intern training and fails in his examination before the State Board of Medical Education and Licensure, does such failure disqualify him from acting as a student intern in any incorporated hospital or State hospital whether or not approved for intern training?

2. May a graduate of an approved medical college before or after serving his required one year as a student intern in a hospital approved for intern training, serve as a student intern in an incorporated hospital or State hospital not approved for intern training even though he may not be pursuing a medical specialty course?

3. Does the Act of July 10, 1935, P. L. 645, require hospitals receiving appropriations from the State to have in attendance at all times a licensed physician, or may it have either a licensed physician or a resident intern?

Before proceeding to dispose of the three questions above mentioned, we wish to say generally that the various statutes relating to interns and our discussion of them in Formal Opinion No. 399 would seem to control in all three situations above outlined. In other words, from our discussion in Formal Opinion No. 399 we can now declare the following conclusions:

1. That a student intern may serve in any incorporated hospital or State hospital so long as he acts under the supervision of the medical or surgical staff of the hospital.

2. The hospital in which he serves need not be a hospital which is approved for intern training, as stated above, it being merely required that the hospital be an incorporated or a State hospital.

3. The requirement that a student must serve an internship of one year prior to his taking the examination, is only a minimum, and not a maximum requirement.

The authority for the above propositions as set forth in Formal Opinion No. 399 is as follows:

The provisions of Section 6 of the Medical Practice Act of June 3, 1911, P. L. 639, as amended, 63 P. S. § 407, provides, inter alia, as follows:

In case of failure at any examination, the applicant shall have, after the expiration of six months and within two years, the privileges of a second examination by the bureau, without the payment of an additional fee, excepting in the case of a bedside, oral, or laboratory examination, when the examination shall be confined to one trial only. In case of failure in a second examination, the applicant must enter de novo and only after a year of post-graduate study approved by the bureau, and qualify under the conditions obtaining at the time of this application.

It is to be noted that this section of the act contains no provision which limits the period of service as an intern by an applicant for medical licensure excepting in case of a failure of the second examination by such applicant who in such case is required to complete one year of an approved post-graduate study if he desires to qualify for another examination for medical licensure. Sight should not be lost of the fact that in the case of bedside, oral, or laboratory examination, the applicant is confined to one examination only.

The proviso of Section 7 of the Medical Practice Act of June 3, 1911, P. L. 639, 63 P. S. § 409, reads as follows:

\* \* \* Provided, That this section relating to certificates to practice medicine and surgery, shall not apply to \* \* \* any one while actually serving as a student intern under the supervision of the medical or surgical staff of any legally incorporated hospital: \* \* \*.

Section 5 of the same act reads, inter alia, as follows:

Applicants for licensure under the provisions of this act shall furnish, prior to any examination by the said board, satisfactory proof that he or she \* \* \* *shall have completed not less than one year as intern in an approved hospital.* \* \* \*. (Italics ours.)

While the Act of July 10, 1935, P. L. 645, 53 P. S. § 2206, et seq., is not quoted in Formal Opinion No. 399, that act provides as follows:

That all hospitals having one hundred beds or more receiving any appropriation from the State shall, at all times, have in attendance at such hospital at least one licensed

physician or *resident interne* who shall have graduated from an approved medical college or approved osteopathic college if such hospital be an osteopathic hospital. (Italics ours.)

However, the 1942 special session of the legislature by its Act No. 12, dated April 13, 1942, amended section 2 of this act which reads as follows:

The Department of Welfare shall enforce the provisions of this act and shall withhold the payment of all money, or the unpaid balance thereof, appropriated or allotted to any hospital failing to comply with the provisions of this act: Provided, however, That during the continuation of the state of war between the United States of America and any foreign country and for six months thereafter no funds appropriated or allotted to any hospital shall be withheld under this act if the Secretary of Welfare determines that the constant attendance of a licensed physician or resident interne cannot be secured by such hospital because of the war emergency.

It would seem that the only reasons for disposing of the questions above mentioned are the following:

1. The Act of July 10, 1935, quoted above, refers to "resident internes" while the proviso to Section 7 of the Medical Practice Act, supra, refers to "student internes."

2. There appears to be a reluctance on the part of the State Board of Medical Education and Licensure to accept the proposition that a student intern is permitted to serve in such capacity even though under the supervision of the medical or surgical staff.

It is true that the Act of July 10, 1935, supra, speaks of "a resident interne," but this term is followed in the act by a qualifying clause which reads who shall have graduated from an approved medical college."

A student intern is, of course, a graduate of a medical college who is serving his internship for at least one year prior to the taking of his examination. In fact, as pointed out in Formal Opinion No. 399, the State Board of Medical Education and Licensure looks upon this minimum year of internship as being a "fifth year of medicine." We, therefore, have no difficulty with the proposition that the Act of July 10, 1935, supra, authorizes you to make appropriations to hospitals which have one hundred or more beds and which have in attendance at least one licensed physician or resident intern who shall have graduated from an approved medical college, and that the General Assembly has therefore and thereby recognized that a hospital is meeting the requirements which the Commonwealth prescribes as to interns. The only significance which the Medical Practice Act, supra,

has in this regard is that it requires the "student interne" to be at all times under the supervision of the medical or surgical staff of any incorporated hospital or State hospital.

In other words, all hospitals, which can be recognized as such under our law, in order to qualify for appropriations under the Act of July 10, 1935, *supra*, as amended, must have at least a qualified physician or an intern in attendance, and it is sufficient if the intern, be he designated as "student" or "resident," be a graduate of an approved medical college if he works under the supervision of the medical or surgical staff of the hospital.

It is to be noted, however, that under the amendment of this act, the Secretary of Welfare during the continuation of a state of war between the United States and any foreign country and for six months thereafter, may properly appropriate or allot to any hospital State funds if he determines that the constant attendance of a licensed physician or resident intern cannot be secured because of the war emergency.

It is our opinion, therefore, that:

1. A graduate of an approved medical college, who has served one year as an intern in a hospital approved for intern training and who has failed to pass his examination before the State Board of Medical Education and Licensure may act as a student intern in any incorporated hospital or State hospital, whether or not approved for intern training, if he has not failed his State board examinations more than once. In case the intern has failed to pass his State board examination the second time, then it is necessary for him to enter an approved medical school *de novo* and satisfactorily complete a year of approved post-graduate study, in order to qualify for another examination leading to licensure.

2. A graduate of an approved medical college, before or after serving his one year of internship, as a student intern, in a hospital approved for intern training, may serve as a student intern in any incorporated hospital or State hospital, approved for intern training, even though he is not pursuing a medical specialty course, as long as he is under the supervision of the medical or surgical staff of the hospital.

3. The Act of July 10, 1935, P. L. 645, 53 P. S. § 2206, *et seq.*, requires hospitals receiving State aid appropriation to have in attendance at all times either a licensed physician or a resident or student intern, who must be, however, under the supervision of the medical or surgical staff of the hospital, provided, however, that if the Secretary of Welfare determines that during the continuation of

a state of war between the United States and any foreign country and for six months thereafter that the constant attendance of a licensed physician or resident intern cannot be secured by such a hospital because of the war emergency, he is not required to withhold any appropriations which may be due the hospital.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

GEORGE J. BARCO,  
*Deputy Attorney General.*

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OPINION No. 435

*Public officers—Magistrates—Notaries public—Induction into United States armed forces—Eligibility to continue office—Act of July 2, 1941—Validity—Constitution, art. XII, sec. 2—Distinction between commissioned officers and others.*

1. The amendment of July 2, 1941, P. L. 231, to the Act of May 15, 1874, P. L. 186, is unconstitutional as violative of article XII, sec. 2, of the State Constitution insofar as it provides that a commissioned officer in the United States armed forces shall not by virtue of his commission be rendered incapable of holding certain offices under the Commonwealth, since such an officer holds an office of trust or profit under the United States within the meaning of the constitutional provision.

2. Induction into the active military service of the United States, whether voluntary or otherwise, does not by virtue of the Act of July 2, 1941, P. L. 231, affect the status of a person holding a commission as justice of the peace or notary public within this Commonwealth, provided that such person is not inducted or does not become a commissioned officer in such forces, and further provided that he intends upon the termination of his service with the United States to resume the duties of his office in the district in which he was elected.

Harrisburg, Pa., August 25, 1942.

Honorable Arthur H. James, Governor, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether Formal Opinion No. 376, dated December 9, 1940, 1939-40 Op. Atty. Gen. 479, is still the opinion of this department. The conclusions of said opinion are as follows:

1. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a justice of the peace within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was elected.

2. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a notary public within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was commissioned.

Article XII, Section 2, of the Constitution of the Commonwealth of Pennsylvania, provides as follows:

No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. \* \* \*

In *Commonwealth ex rel. Crow v. Smith*, 343 Pa. 446 (1942), decided after our foregoing opinion was rendered, the Supreme Court of Pennsylvania held that a Major in the United States Army holds and exercises an office of trust or profit under the United States within the meaning of article XII, section 2, *supra*. In our Formal Opinion No. 424, dated May 29, 1942, we held that a Lieutenant Colonel in the United States Army also holds such an office.

In Formal Opinion No. 429, dated July 15, 1942, we advised you that one individual could not hold a commission as a Colonel in the United States Army, and at the same time hold the office of prothonotary, clerk of the court of quarter sessions, clerk of the court of oyer and terminer, and clerk of the orphans' court, of McKean County.

The question at once arises whether it makes any difference if an individual who holds or exercises an office in this Commonwealth to which a salary, fees or perquisites are attached, holds or exercises an office or appointment of trust or profit under the United States merely by becoming a member of the military forces of the United States, or whether such individual does not exercise an office or appointment under the United States in the military forces thereof unless he is a commissioned officer in such forces. By the Act of May 15, 1874, P. L. 186, 65 P. S. § 1, the General Assembly indicated that the aforementioned difference in rank was immaterial. In section 1 of said act it said in part as follows:

Every person who shall hold any office, or appointment of profit or trust, under the government of the United States, *whether a commissioned officer or otherwise*, a subordinate officer or agent, who is or shall be employed under the legislative, executive or judiciary departments of the United States, \* \* \* is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, notary public, \* \* \* under this commonwealth. (*Italics ours.*)

However, the act of 1874 was amended July 2, 1941, P. L. 231, so that it now reads as follows:

Every person who shall hold any office, or appointment of profit or trust, under the government of the United States, whether an officer, a subordinate officer or agent, who is or shall be employed under the legislative, executive or judiciary departments of the United States, and also every member of congress, is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, notary public, mayor, recorder, burgess or alderman of any city, corporate town or borough, resident physician of the lazaretto, constable, judge, inspector or clerk of election under this commonwealth: Provided, however, That the provisions hereof shall not apply to any person who shall enlist, enroll or be called or drafted into the active military or naval service of the United States or any branch or unit thereof during any war or emergency as hereinafter defined.

It will be noted at once that the words "whether a commissioned officer or otherwise" have been supplanted by the words "whether an officer." This indicates a clear intention on the part of the legislature to eliminate persons in the military who are not officers; and by the term "officers," as commonly understood, we understand that the legislature meant commissioned officers. The proviso above quoted, from the act of 1941, removes all doubt as to what the General Assembly had in mind in the subject legislation. This proviso, interpreted literally, would eliminate all members of the armed forces of the United States, whether commissioned officers or otherwise, from the incompatibility provisions of the legislation.

However, as we said in Formal Opinion No. 424, *supra*, "no act of assembly could avoid the express mandate of the Constitution." In short, if our Constitution provides, as it does, that no person may hold or exercise an office of trust or profit under the United States while holding or exercising an office under this Commonwealth to which a salary, fees or perquisites are attached, and the Supreme Court has decided, as it has, that a commissioned officer in the military forces of the United States holds an office of trust or profit under the United States, no act of the legislature can alter the situation.

The foregoing would appear to return us to the question posed above, namely, does the matter of rank make any difference? The legislature has indicated that it does. The courts have not yet had their say, except with relation to commissioned officers, as hereinbefore indicated. We doubt whether the courts will declare that anyone in the military forces of the United States not a commissioned officer therein holds an office or appointment of trust or profit under the United States. A common sense view of the situation would seem to be that a soldier or sailor below the rank of commissioned officers was not intended to be embraced within article XII, section 2, of our Constitution. Our conclusion that an individual does not come within the constitutional prohibition unless he is a commissioned officer has the support of the Attorney General of Illinois. In an opinion dated May 7, 1942, that official ruled that unless the person involved was a commissioned officer, a provision of the Constitution of Illinois similar to article XII, section 2, of ours, was not applicable.

In *Commonwealth ex rel. Bache v. Binns*, 17 S. & R. 219 (1828), cited in Formal Opinion No. 376, *supra*, the court was discussing article II, section 8, of the Constitution of the Commonwealth of 1790, which provided that no member of Congress from this State nor any person holding or exercising any office of trust or profit under the United States should at the same time hold or exercise any office in the state to which a salary is by law annexed or any other office which the legislature might declare incompatible with the offices or appointments under the United States, and the Act of February 13, 1802, P. L. 37, as supplemented by the Act of March 6, 1812, P. L. 85, which legislation was the precursor of the act of 1874, as amended by the act of 1941, *supra*. The act of 1802 contained the words "Whether a commissioned officer or otherwise." Rogers, J., in a dissent wherein Gibson, C. J., concurred, beginning at page 233 of 17 S. & R., said:

Every office is an appointment or employment, but it does not follow that every appointment is an office; they are not convertible terms. \* \* \* The disqualification created by the eighteenth section of the first article of the constitution, extends to a person holding an office; it does not in terms embrace the case of a person who holds an appointment merely; \* \* \* That the word appointment is sometimes used as synonymous with office, is admitted; but it is submitted, that it is not so to be understood in the section now under review.

It does not, however, follow from the foregoing that Formal Opinion No. 376, *supra*, must be modified to accord with the views herein expressed, or its scope accordingly narrowed. That opinion does not apply to commissioned officers; it relates to enlisted men only.

We do not discuss here the nature of the office of justice of the peace or notary public for the reason that we did so fully in the opinions herein cited. We need only say that both of such offices are offices in this Commonwealth to which a salary, fees or perquisites are attached.

It is our opinion, therefore, that:

1. Induction into the active military service of the United States, whether voluntary or otherwise, does not affect the status of a person holding a commission as a justice of the peace within this Commonwealth provided such person is not inducted as or does not become a commissioned officer in such forces.

2. Induction into the active military service of the United States, whether voluntary or otherwise, does not affect the status of a person holding a commission as a notary public within this Commonwealth provided such person is not inducted as or does not become a commissioned officer in such forces.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 436

*Veterans—Preferential appointment to civil service positions—Personnel director  
Extent of preferences—Provisional employees—Veterans' Preference Act of  
August 5, 1941.*

1. The Veterans' Preference Act of August 5, 1941, P. L. 872, applies to the selection of the personnel director for the civil service commission.

2. Under the Veterans' Preference Act of August 5, 1941, P. L. 872, if a veteran's name does not stand highest on a certified list but does appear further down thereon, he must be selected and appointed, but if more than one appears among the highest three on the certified list, the appointing authority has the discretionary choice of appointing either or any of such veterans.

3. Under the third paragraph of section 4 of the Veterans' Preference Act of August 5, 1941, P. L. 872, if no veteran's name appears on the certified list, that is among the highest three, but a veteran's name does appear further down on the eligible list, he may in the discretion of the appointing authority, be appointed.

4. In the selection of provisional employes in the civil service of the Commonwealth where there are no eligible lists, since no civil service examination is required and such provisional employes are outside the classified service, if there is a veteran or more than one veteran available possessing the requisite qualifications, such veterans must be selected and appointed.

Harrisburg, Pa., September 2, 1942.

Honorable Robert Hall Craig, Chairman, State Civil Service Commission, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of July 27, 1942 requesting advice concerning certain problems arising as a result of the Act of August 5, 1941, P. L. 872, 51 P. S. § 491.6 et seq. This act is generally referred to as the Veterans' Preference Act and provides for and requires preferential appointment for public positions by the Commonwealth and its political subdivisions for honorably discharged persons who served in the military or naval service during any war in which the United States was engaged.

Specifically, you desire advice upon the following questions:

1. Does the Veterans' Preference Act apply to the selection of a Personnel Director, a position requiring a combination of technical skill and high administrative ability?

2. In the event the Veterans' Preference Act does apply to this selection, if more than one veteran appears in the top three, does the commission have the choice of either, or any of, such veterans?

3. If there is no veteran in the top three but a veteran appears further down an eligible list (not a certified list), must he be selected?

4. In the selection of a provisional employe for any position in the civil service of the Commonwealth where there are no eligibility lists, if there is a veteran or more than one veteran available, must he or they be selected?

An exhaustive historical review of the subject of statutory preferential treatment of United States war veterans in public employment in the Commonwealth is to be found in our Formal Opinion No. 320 dated February 15, 1940. Although this opinion construes certain aspects and effects of the Acts of June 27, 1939, P. L. 1198, 51 P. S. § 491.1 et seq., and April 12, 1939, P. L. 27, 51 P. S. § 481, the principles therein enunciated are applicable to problems presented under the Veterans' Preference Act of August 5, 1941, *supra*.

Referring in order to your questions under the aforesaid Veterans' Preference Act of August 5, 1941, *supra*, a careful review of the act discloses no exceptions to the provisions of the act and, therefore,

the preferences in said act would apply to the selection of the Personnel Director. There is no authority under the law for your Commission to exclude any position, although it may require technical skill and high administrative ability. The preference applies only to veterans who have passed the regular examinations and, therefore, the preference could only be accorded to those who have demonstrated through such examinations that they possess the technical skill and high administrative ability required for the important office of Personnel Director. Statutes preferring veterans who have passed examinations whether the preference is mandatory or discretionary have been declared constitutionally valid. See case of Commonwealth ex rel. Graham (to use of Markham et al.) v. Schmid, 333 Pa. 568 (1938).

In addition to the provision for ten points to be added to grade in competitive examinations for all soldiers who successfully pass civil service examinations, section 4 of the Veterans' Preference Act provides for preference as follows:

Whenever any soldier possesses the requisite qualifications and is eligible to appointment to or promotion in a public position where no such civil service examination is required, the appointing power in making an appointment or promotion to a public position shall give preference to such soldier.

Whenever any soldier possesses the requisite qualifications and his name appears on any *eligible* or promotional *list certified* or furnished as the result of any such civil service examination, the appointing or promoting power in making an appointment or promotion to a public position *shall* give preference to such soldier, *notwithstanding that his name does not stand highest on the eligible or promotional list.*

In making an appointment or promotion to public office, where such a civil service examination is required, the appointing or promotional power *may* give preference to any soldier who has passed the required examination for appointment or promotion to such position and possesses the requisite qualifications, although his name does not appear on the eligible or promotional list *certified or furnished to the appointing or promoting power.* (Italics ours.)

Section 205 (b) of the Civil Service Act, the Act of August 5, 1941, P. L. 752, 71 P. S. § 741.205 (b), provides for appointment of the Personnel Director as follows:

Section 205. Qualifications, Appointment, Compensation and Removal of Director.

\* \* \* \* \*

(b) Within ninety days after it is appointed, and thereafter within ninety days after a vacancy occurs, the commission shall hold a competitive examination in accordance with

the provisions of this act and on the basis of that examination shall establish an employment list of persons found eligible for appointment as director. *The commission shall appoint one of the three highest ranking eligibles as the director.* The commission shall have the same powers and duties with respect to the conduct of the examination, establishment of the employment list and making an appointment therefrom that are vested in or imposed upon the director under the provisions of this act with respect to other positions in the classified service. (Italics ours.)

At this point it seems well to observe that veterans' preference acts should be strictly construed. See Am. Jur. (Civil Service), Vol. 10, p. 929.

Next, we should note that the second and third paragraphs of section 4 of the Veterans' Preference Act seems to make a distinction between a certified list and an eligible list. In the second paragraph we have a provision relative to eligible lists certified, that is, to certified lists, and here it is provided that if the veteran's name appears on the certified list it is mandatory on the appointing authorities to appoint him even if his name does not stand highest on such list. In the third paragraph, however, we have a provision relative to lists of those who have passed the examination, and here it is provided that if the veteran's name does not appear on the certified list, the appointing authority within its discretion may appoint him provided he has passed the required examination.

In construing the above sections of the Veterans' Preference Act and the civil service acts together, it is clear that if only one veteran's name appears on the certified list he must be appointed. Under the ruling of Formal Opinion No. 320, as long as the soldier on a fair basis possesses the requisite qualifications, that is, is morally and physically fit to be employed, he must be appointed to the position sought even though he does not stand highest on the eligible list certified as a result of the civil service examination. However, if more than one veteran's name appears among the highest three, the appointing authority, the commission, is given discretionary power and has the choice of appointing either or any of such veterans.

Although there is no express provision in the Veterans' Preference Act of August 5, 1941, *supra*, regarding the selection of provisional appointees, the above section 4, paragraph 1, provides that where no civil service examination is required, the appointing power in making an appointment to a public position shall give preference to a soldier. It would appear, therefore, that since the preference is generally provided for the entire service of the Commonwealth, it would include the appointment of provisionals, since "no Civil Service examination

is required," for them and they are outside the classified service and can never become a part of the classified service until they qualify under the provisions of the Civil Service Act, *supra*. See *McCarthy v. Johnston*, 326 Pa. 442 (1937).

In view of the foregoing, we are of the opinion that:

1. The Act of August 5, 1941, P. L. 872, 51 P. S. § 491.6 et seq., commonly referred to as the Veterans' Preference Act, applies to the selection of the Personnel Director for the Civil Service Commission.

2. Under the Veterans' Preference Act, *supra*, if a veteran's name does not stand highest on a certified list, but his name appears further down on such certified list, he must be selected and appointed. However, if more than one veteran appears among the highest three on the certified list, the commission or appointing authority for the Personnel Director, has the discretionary choice of either or any of such veterans.

3. Under the third paragraph of section 4 of the Veterans' Preference Act, *supra*, if there is no veteran among the highest three, viz., the certified list, but a veteran's name appears further down on an eligible list, he may, within the discretion of the appointing authority, be appointed.

4. In the selection of provisional employes for any position in the civil service of the Commonwealth, where there are no eligible lists, since no civil service examination is required and such provisional employe is outside the classified service, if there is a veteran or more than one veteran available possessing requisite qualifications, such veterans must be selected and appointed.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 437

*State Board for Examination of Public Accountants—Certified public accountants—Examination—Certificate—Regulations regarding educational requirements—Act of March 29, 1899, P. L. 21.*

The State Board for the Examination of Public Accountants has no authority to adopt or to enforce a regulation requiring applicants for admission to the examination for certified public accountants to have completed two years of college education or a four-year college course.

Harrisburg, Pa., September 11, 1942.

Honorable Francis B. Haas, Superintendent of Public Instruction,  
Harrisburg, Pennsylvania.

Sir: You have asked our opinion as to whether or not the State Board for the Examination of Public Accountants has the authority to adopt a regulation which would require an applicant for admission to examination for certificate as a certified public accountant to have completed two years of college education or a regular four-year college course.

Section 1 of the Act of March 29, 1899, P. L. 21, 63 P. S. § 1 reads:

*Any citizen of the United States, residing or having an office for the regular transaction of business in the state of Pennsylvania, being over the age of twenty-one years and of good moral character, and who shall have received from the Governor of the State of Pennsylvania a certificate of his qualification to practice as a public expert accountant, as hereinafter provided, shall be designated and known as a certified public accountant, and no other person shall assume such title, or use the abbreviation C. P. A., or any other words, letters or figures to indicate that the person using the same is such certified public accountant. Every person holding such certificate, and every co-partnership of accountants, every member of which shall hold such certificates, may assume and use the title of certified public accountants, or the abbreviation thereof, C. P. A.: Provided, That no other person or co-partnership shall use such title or abbreviation, or other words, letters or figures, to indicate that the person or co-partnership using the same is such certified public accountant. (Italics ours.)*

Section 2 of the same act, as amended, 63 P. S. § 3 provides:

The examination for certificates shall be based upon an examination in commercial law and general accounting; said examination shall take place in Philadelphia and Pittsburgh, once a year, in the month of November of each year, under such rules and regulations as may be adopted by the board.

The only other pertinent reference to examination mentioned in this act is also contained in section 2, as amended, 63 P. S. § 4 which states that:

In no event, however, shall a special examination be given or a degree granted to any person, except by passing a regular examination as herein provided for, but certified public ac-

countants of other States of the United States, who have been certified for at least one year, may be recommended for certification, at the discretion of the said board, for certificates without any examination.

It is obvious that there is nothing contained in the act which requires that an applicant for examination as a certified public accountant must complete either two years of college education or a regular four-year college course. In fact the act is silent as to any scholastic requirement that may be needed by an applicant.

Section 1, *supra*, merely provides that such an applicant must be an individual of good moral character, over twenty-one years of age and a citizen of the United States, residing in or having an office for the regular transaction of business in the State of Pennsylvania.

Under section 2 of the act, *supra*, the legislature provided that the examination for certificates of certified public accountants shall be based upon an examination in the subjects of commercial law and general accounting. Here again it is to be noted that there are no other educational or scholastic requirements. If the applicant for examination has sufficient knowledge of commercial law and general accounting to pass the examination he need have no other educational qualification.

Section 2 also provides that the board is to give these examinations once a year during the month of November *under such rules and regulations as may be adopted by the board*. This language of itself does not authorize the board to adopt and enforce a regulation requiring an applicant for examination to have completed two years of college education or a regular four-year college course. It matters not how the applicant for examination becomes conversant with the subjects of commercial law and general accounting so long as he is able successfully to pass the examinations given by the board on these subjects.

Under the provisions of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, Article XIII, Section 1310, as amended, 71 P. S. § 360:

The State Board of Examination of Public Accountants *shall continue to exercise the powers, and perform the duties, by law vested in and imposed upon the said board.* (Italics ours.)

This provision of The Administrative Code, when considered with Section 2 of the Act of March 29, 1899, *supra*, makes it very evident that a regulation requiring the completion of a two- or four-year

period of study in college as a prerequisite of an applicant for examination is clearly an assumption of authority by the board which was not granted nor delegated to it by the legislature. An assumption of such power by the board would obviously be illegal and unconstitutional.

The duty of the board is to give an examination in accordance with the requirements provided by the legislature, not to legislate. For the board to adopt a regulation requiring a period of years of study in college for an applicant to qualify for examination for a certificate as a certified public accountant is to make an asseveration which has neither the sanction of the law nor the support of the judicial opinions. If such a regulation is promulgated by the board it must at least have some basis of authority from the legislature: See Formal Opinion No. 396. Consequently, we conclude that the board has no legal authority to adopt and enforce such a regulation as it has proposed.

It is our opinion, therefore, and you are accordingly advised that the State Board for the Examination of Public Accountants has no authority to adopt or to enforce a regulation requiring applicants for admission to the examination for certified public accountants to have completed two years of college education or a four-year college course.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

GEORGE J. BARCO,  
*Deputy Attorney General.*

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OPINION No. 438

*Transfer inheritance tax—Supervising the making of appraisements—Appraisers—Expert appraisers and other employes appointed by the Auditor General but responsible to Department of Revenue—Act of April 9, 1929, P. L. 343.*

Since the enactment of The Fiscal Code, the Act of April 9, 1929, P. L. 343, the Department of Revenue instead of the Department of the Auditor General is charged with the power and duty of supervising the making of appraisements and the work of investigators, appraisers, expert appraisers, permanent appraisers and other employes appointed by the Auditor General to assist the Register of Wills in collecting the transfer inheritance tax; therefore, the appointment of Ellwood T. Bauman by the Auditor General as a supervisor of the making of

appraisements in a district composed of twelve counties and the payment of his salary and expenses out of transfer inheritance tax collections in the hands of the Register of Wills of Erie County which is located in such district is entirely without authority of law and is a nullity. Under the circumstances the Auditor General and the State Treasurer have no authority to allow Ellwood T. Bauman's claim for compensation and expenses and the Department of Revenue is under no legal obligation to file an answer to the petition which has been served on it in this respect as this opinion is a complete answer.

Harrisburg, Pa., September 30, 1942.

Honorable Edward B. Logan, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You state you have received a letter dated September 23, 1942 from the Department of the Auditor General, together with a copy of a petition by Ellwood T. Bauman, filed before the Auditor General and the State Treasurer for the settlement of a claim for alleged services rendered and expenses incurred; that in the petition Ellwood T. Bauman avers that he was appointed a Special Inheritance Tax Appraiser by the Auditor General on May 15, 1941 at an annual salary of \$3,600 to be paid out of inheritance tax collections in the hands of the Register of Wills of Erie County; that the petitioner was charged with the supervision of inheritance tax appraisements in District No. 7 comprising twelve counties of the Commonwealth; that the petitioner has not received any compensation for the period from August 15, 1942 to September 15, 1942, nor has he received reimbursement for expenses necessarily incurred during that time; that despite the fact that the petitioner has rendered services during such period, the Register of Wills has wilfully and unlawfully refused to make payment for such services or expenses incurred in connection therewith during such period; and that the letter from the Department of the Auditor General directs you, as Secretary of Revenue, to file an answer to the petition within a week of its date, namely not later than September 30, 1942.

You further state that when you became Secretary of Revenue on June 1, 1942 you found that after April 1, 1941 an excessive number of inheritance tax employes had been appointed by the present Auditor General in various counties for the amount of work to be done in any of such counties; that on August 7, 1942 you sent a letter to the Register of Wills of each county in which you found an excessive number of employes in which you, as Secretary of Revenue, (1) instructed the Register of Wills in his capacity as agent of the Commonwealth for the collection of transfer inheritance taxes to notify enough of such employes that their services were unnecessary and that they would receive no further compensation out of transfer in-

heritance tax collections in the possession of the Register of Wills in order to bring the number of employes and the cost of collecting substantially back to the April 1, 1941 level, and (2) advised that you would withhold your approval from the monthly settlement of the accounts of the Register of Wills until this was done.

You further state that as a result of the above instructions the Register of Wills in Erie County addressed a letter on August 14, 1942 to Ellwood T. Bauman, the petitioner mentioned above, advising him that his salary would thenceforth be withheld; that the Register of Wills of Erie County advised the eleven other Registers of Wills in the district to which Bauman had been assigned by the Auditor General of his action; and that you as Secretary of Revenue likewise advised such Registers of Wills of this action, stating that under the law there is no authority for the Auditor General or his employes to supervise the making of the appraisements and the collection of transfer inheritance tax inasmuch as that function is vested by The Fiscal Code in the Department of Revenue.

You ask to be advised whether the claim of the petitioner under the above circumstances is a lawful one, and what action you are required to take in the matter.

The petitioner's claim purports to be filed before the "Auditor General and the State Treasurer pursuant to The Fiscal Code," the Act of April 9, 1929, P. L. 343, 72 P. S. § 1 et seq. While the petition does not so state, the petitioner apparently seeks to proceed under Sections 1003 and 1004 of The Fiscal Code which provide that "The Auditor General and the State Treasurer shall continue to have the power to adjust and settle claims against the Commonwealth as now provided by law," and prescribe the procedure to be followed which among other things permits the claimant, if aggrieved, to take an appeal to the Court of Common Pleas of Dauphin County. This power of the Auditor General and the State Treasurer to examine and adjust claims against the Commonwealth which The Fiscal Code refers to was originally found in the Act of March 30, 1811, P. L. 145, 5 Sm. L. 228. As pointed out by the Supreme Court in *Commonwealth v. Eastern Paving Co.*, 228 Pa. 573 at page 576:

\* \* \* That legislation was enacted for the benefit of creditors, who, theretofore, had no manner of enforcing a just demand against the sovereign, and permitted an adjustment and approval of a claim by the auditor general and state treasurer, whose action was subject to review on appeal. \* \* \*

Usually the claims presented under the above legislation before the Auditor General and the State Treasurer are by creditors who

have some lawful claim which is unenforceable against the Commonwealth because of its immunity from suit. Whether a claim like the present one, the validity of which depends entirely upon the interpretation of existing legislation, is a proper one to be made before the Auditor General and the State Treasurer presents a nice question. However, we do not find it necessary to go into this question in view of the fact, as we will later point out, that the present claim is not a valid one against the Commonwealth as a matter of law. In passing we note that if the claim were a proper one to be presented before the Auditor General and the State Treasurer the Auditor General would find himself in the undesirable position of acting, in effect, as judge and jury in that the present claim arises out of a legal dispute involving the respective powers of the Secretary of Revenue and the Auditor General in connection with the supervision and collection of the transfer inheritance tax.

Under the Transfer Inheritance Tax Act of June 20, 1919, P. L. 521, 72 P. S. § 2301 et seq., the Register of Wills of each county was empowered to appoint appraisers to appraise the estates of decedents who were residents in his county. (See Section 10.) However, by the Act of May 4, 1927, P. L. 727, 72 P. S. § 2324 et seq., the power to appoint such appraisers was transferred from the Register of Wills to the Auditor General, and in addition that act provided in section 1 as follows:

That the Auditor General shall have complete supervision of the making of appraisements in estates of resident decedents. He shall have power to adopt and enforce rules and regulations for the just administration of the act to which this is a supplement. The several registers of wills shall continue to collect the transfer inheritance taxes and to receive the compensation for such services now provided by law.

It is clear that under the above provision the Auditor General had power to appoint persons to supervise the making of appraisements in estates of decedents if he deemed it necessary to do so.

The functions of the Auditor General in connection with the appraisal and collection of transfer inheritance tax were completely revised, changed and circumscribed by the Act of April 9, 1929, P. L. 343, which is designated as The Fiscal Code; that is to say, most of such functions of the Auditor General were transferred to the newly created Department of Revenue while a few of the functions remained in the Auditor General. This is very clear as is indicated by the following sections of The Fiscal Code:

Section 201 (72 P. S. 201) provides:

Except as otherwise in this act provided, the Department of Revenue shall exercise the powers and perform the duties heretofore exercised and performed by the Auditor General, the State Treasurer, the Insurance Commissioner, and all other departments, boards and commissions of the State Government, in the settlement of taxes, and the collection of taxes, license fees, and other moneys due the Commonwealth.

Section 203 (72 P. S. 203) as last amended by the Act of February 2, 1937, P. L. 3 provides in part as follows:

The Department of Revenue shall have the power and its duty shall be;

\* \* \* \* \*

(g) To supervise the collection, by the registers of wills, of transfer inheritance taxes, and to exercise the powers and perform the duties hereinafter provided in connection with the collection of such taxes;

Section 407 (72 P. S. 407) provides:

The Auditor General shall continue to appoint, or approve the appointment, fix the compensation, and approve or disapprove the expense accounts, of such clerks, investigators, appraisers, expert appraisers, permanent appraisers, and other employes, as may be necessary to enable the registers of wills of the several counties to collect transfer inheritance taxes upon estates of resident decedents as now provided by law.

He shall certify to the Department of Revenue, from time to time, the names of all persons appointed by him, or whose appointment he has approved hereunder, the compensation payable to such persons, and the amounts of expense accounts which he has approved.

Section 608 (72 P. S. 608) provides:

The registers of wills of the several counties shall continue to act as the agents of the Commonwealth for the collection of the tax or fee payable to the Commonwealth upon the granting of letters testamentary, or of administration, and for the collection of transfer inheritance taxes in the case of resident decedents, and shall exercise all the powers and perform all the duties incidental thereto, and receive compensation therefor, as provided by law, but they shall

(a) Make to the Department of Revenue all reports, certify to the department all facts, and obtain from the department all approvals, which have heretofore been made or certified to or obtained from the Auditor General, except as hereinbefore in this act provided;

(b) Forward to the Department of Revenue, instead of to the Auditor General, all duplicate receipts issued by them to executors or administrators; and

(c) On the first Monday of each month, make their returns to the Department of Revenue, and pay the taxes collected into the State Treasury, through the Department of Revenue, as provided in this act.

Registers of wills shall continue to give bond to the Commonwealth, as now provided by law, but all bonds hereafter given shall be delivered to the Department of Revenue, instead of to the Auditor General.

Until the register of wills of any county shall have given bond as required by law, and delivered it to the Department of Revenue, transfer inheritance taxes in his county shall be collected by the county treasurer, as now provided by law, and transmitted to the State Treasury, through the Department of Revenue.

Section 1201 (72 P. S. 1201) in so far as it is applicable here provides:

The Department of Revenue shall exercise the following powers and perform the following duties, heretofore exercised and performed by the Auditor General, in connection with the collection by the registers of wills of the several counties of transfer inheritance taxes:

The Department of Revenue shall have the power and its duty shall be,

(a) To supervise the making of appraisements in estates of resident decedents, and, for this purpose, to adopt and enforce rules and regulations for the just administration of the laws imposing transfer inheritance taxes;

\* \* \* \* \*

(c) To supervise the work of investigators, appraisers, expert appraisers, permanent appraisers, and other employes, appointed by the Auditor General to assist registers of wills in enforcing the transfer inheritance tax laws;

\* \* \* \* \*

(f) In settling the accounts of registers, or of any county treasurer who has acted prior to the qualification of the register of wills of his county, to credit the accounting officer and deduct from the settlement all commissions due such officer for collecting transfer inheritance taxes, the compensation and expenses paid with the approval of the Auditor General to investigators, appraisers, and expert appraisers, the costs of advertising, and all other reasonable fees and expenses incurred in the collection of the tax;

In view of the foregoing it is clear that since the enactment of The Fiscal Code the Auditor General retains merely the right to appoint, fix the compensation and approve or disapprove the expenses of such clerks, investigators, appraisers and other employes as may be necessary to enable the registers of wills of the several counties to collect transfer inheritance taxes upon the estates of resident decedents. In so doing, the Auditor General is limited to the appointment in each county of certain designated persons required to assist the register of wills of that particular county in the collection of the transfer inheritance taxes on the estates of decedents who were domiciled in that county.

On the other hand, it is clear that since the enactment of The Fiscal Code the Auditor General has had no power to supervise the making of appraisements or to adopt and enforce rules and regulations for the just administration of the transfer inheritance tax laws or to supervise the work of persons appointed by him to assist the Register of Wills in enforcing the transfer inheritance tax laws. These powers are now vested in the Department of Revenue and have been so vested since the enactment of The Fiscal Code.

Since the Department of Revenue is now charged with the supervision of the making of appraisements and the work of appraisers and other persons appointed by the Auditor General to assist the Register of Wills in enforcing the transfer inheritance tax laws, it follows that that department has authority to divide the State into districts and to designate a supervisor in each district who would supervise such matters in the counties comprising the district. On the other hand, since the Auditor General is no longer charged with such functions it follows that there is no authority for the Auditor General to divide the State into such districts or to appoint supervisors for such districts.

Moreover we point out that there is no authority in existing law for the payment of the salary and expenses of such a supervisor out of transfer inheritance tax collections in the hands of a Register of Wills of a particular county situated in a district composed of more than one county.

Accordingly, we are of the opinion that since the enactment of The Fiscal Code, the Act of April 9, 1929, P. L. 343, § 1 et seq., the Department of Revenue instead of the Department of the Auditor General is charged with the power and duty of supervising the making of appraisements and the work of investigators, appraisers, expert appraisers, permanent appraisers and other employes appointed by the Auditor General to assist the Register of Wills in collecting the transfer inheritance tax; therefore, the appointment of Ellwood T. Bauman

by the Auditor General as a supervisor of the making of appraisements in a district composed of twelve counties and the payment of his salary and expenses out of transfer inheritance tax collections in the hands of the Register of Wills of Erie County which is located in such district is entirely without authority of law and is a nullity. Under the circumstances you are further advised that the Auditor General and the State Treasurer have no authority to allow Ellwood T. Bauman's claim for compensation and expenses and that you are under no legal obligation to file an answer to the petition which has been served on you in this respect as this opinion is a complete answer.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

E. RUSSELL SHOCKLEY,  
*Deputy Attorney General.*

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OPINION No. 439

(Opinion No. 440, Recalled)

*Beneficial associations—Charter provisions—Validity—Conclusiveness on members—Requiring observance of trade union principles—Act of July 17, 1935, as amended.*

1. Neither the Fraternal Benefit Society Act of July 17, 1935, P. L. 1092, as amended, nor present public policy justifies the Insurance Commissioner of Pennsylvania in refusing to accept for filing the constitution of a fraternal benefit society which provides for expulsion of members who refuse to follow the observance of certain trade union principles.

2. Since under the Fraternal Benefit Society Act of July 17, 1935, P. L. 1092, as amended, members of such a society join it knowing that they are to be bound by the provisions of its charter and bylaws, and amendments thereto lawfully made in the future, the action of a fraternal benefit society in expelling a member for refusing to follow the observance of certain trade union principles as required by the charter of the society is not such an illegal act as to justify the forfeiture of the society's charter.

Harrisburg, October 29, 1942.

Honorable Ralph H. Alexander, Acting Insurance Commissioner,  
Harrisburg, Pennsylvania.

Sir: Your department has requested an opinion as to whether a fraternal benefit society can predicate continued good standing in the Order upon the member's observance of certain trade union principles.

Fraternal benefit societies are governed by the Act of July 17, 1935, P. L. 1092, as amended, 40 P. S. § 1051, et seq. Section 17 provides that the constitution and laws of a society shall be filed with the Insurance Commissioner at the time of incorporation. A foreign fraternal benefit society which seeks admission to do business in Pennsylvania is examined by your department and is required to submit its constitution and laws to your department.

Your inquiry arises by reason of the fact that a foreign fraternal benefit society recently submitted to your department the constitution of said society which provides for the expelling of members under certain conditions, one such condition reading as follows:

For taking the place of a striker or for not participating in a strike declared by a bona fide union through the vote of a majority of workers or employees of the establishment. For using the services of a worker or employee who replaced a striker or who refused to participate in a strike declared by a bona fide union through the vote of a majority of employees of the establishment.

You inform us that in the year 1919 the Department of Justice, while not issuing an opinion, stated in correspondence that such a provision as that quoted above, is against public policy and that the invocation of such provision against a member is such an illegal act as to be the cause for the forfeiture of the charter of the society.

According to the definition of a fraternal benefit society as given in section 1 of the act, these societies are carried on for the mutual benefit of the members and their beneficiaries, are not for profit, have a lodge system and representative form of government, and may even limit membership to a secret fraternity having a lodge system.

Section 17 (1) (b) of the act, after providing that the purpose clause shall not include more liberal powers than are granted by the act, has only the following to say about the purpose for which such a society may be formed, and we take it that this would be applicable also to a foreign society:

\* \* \* Any lawful, social, intellectual, educational, charitable, benevolent, moral, or religious advantages may, however, be set forth among the purposes of the society.

Subsection 1 of Section 10 of the Fraternal Benefit Society Act, supra, provides that the constitution and laws of the society shall constitute, in part, the agreement between the society and the member regarding the member's beneficiary certificate. Said subsection provides, in part, as follows:

Every beneficiary certificate shall specify the amount of benefits furnished thereunder and shall provide that the certificate, charter, or articles of incorporation, or, if a voluntary association, the articles of such association, *the constitution and laws of the society*, the application for membership, and medical examination or health certificate, signed by the applicant, and all amendments to each thereof, *shall constitute the agreement between the society and the member.* \* \* \* (Italics ours.)

Section 9 of the act which empowers the society to legislate upon and regulate its internal activities, reads in part as follows:

Every such society shall provide for the payment of death benefits and may provide for the erection of monuments to mark the graves of its deceased members and shall have power: *To make, alter, and amend its constitution and laws for the government of the society, to arrange for the management of its affairs, the admission and classification of its members, to control and regulate terms and conditions governing the issuance of its beneficiary certificates,* \* \* \*. (Italics ours.)

In part, section 6 of the said act provides also as follows:

\* \* \* Such constitution and laws, when made and altered and amended, shall be the law governing the society and its officers, board of directors, or managers, subordinate or constituent lodges, councils, or branches, *and all members and beneficiaries in their relation thereto.* \* \* \* (Italics ours.)

The Superior Court, in *Bagaj v. First Slovak Wreath*, 136 Pa. Super. Ct. 344 (1939), a case involving a fraternal benefit society, at page 346, says:

By becoming a member of the defendant organization, Bagaj agreed to abide by all its laws and regulations, which determine its power and obligations.

It is our conclusion, therefore, that the particular society in question can bind its members to the constitutional provision above quoted without violating the present law governing such societies.

We revert to the question of public policy, above mentioned. It is to be noted that twenty-three years have transpired since this department expressed itself on this matter of public policy, as above outlined, and it is to be noted further that during this period of twenty-three years there have been many changes in the law of the United States and of this Commonwealth with respect to labor and trade unions. Taking the present laws and court decisions as a basis for determining present public policy we readily dispose of the 1919 suggestion by saying that such a provision in the constitution or law of a fraternal benefit society is not now against public policy.

We do not infer, however, that any constitutional provision or law of such a society must be accepted by your department. Section 17 (1) (b), quoted above, emphasizes that a purpose must be lawful. Conceivably a constitution might provide that the members owe allegiance to some foreign nation, or that the members shall belong to some political group inimical to our government, or the purpose in other respects might be unlawful or immoral. We, therefore, commend your department for its zeal in scrutinizing all such matters and we advise that your department is warranted in refusing to accept a fraternal benefit society should its law, constitution or charter contain provisions objectionable for reasons suggested above. The question of public policy is also always open. As we have said, however, in this case we find nothing objectionable, or unlawful, or against public policy.

We desire, also, to comment upon the suggestion of this department made in 1919 to the effect that the invocation of what was then considered an objectionable provision against a member, would be such an illegal act as to be the cause for the forfeiture of the charter of the society.

As we have pointed out above, the law specifically provides that the constitution and bylaws of the society are a part of the agreement between the society and the member and it follows, of course, that the member is bound thereby regardless of what appears in his beneficiary certificate. It is true that in the ordinary case of insurance the policy contains all the terms and conditions, but as has been suggested throughout herein fraternal insurance is distinctively different in this respect because the members bind themselves together by a lodge system for their mutual benefit and not for profit, and membership may even be limited to members of a secret fraternity having a lodge system. It is not the case of an assured dealing at arms length with an insurer. In fact, section 5 of the act discloses this difference between fraternal insurance and the usual type of insurance. Section 5 provides as follows:

The word "Insurer" or any other general designation as used in the laws now in force or hereafter enacted, governing any form of insurance whatsoever, *shall not apply to fraternal benefit societies unless expressly designated therein.* (Italics ours.)

Because of the law herein quoted and because of the nature of fraternal societies as above described, we are unable to find any intention that an individual member be accorded the same protection that is due a holder of an insurance policy of the usual type. The member of a fraternal society joins it with his eyes open. It follows

that there is no requirement upon the Insurance Department of this Commonwealth to afford the member of such a society protection other than that protection which the individual member receives through the supervision by the department of the society.

We are of the opinion that: 1. Neither the law nor present public policy would justify you in refusing to accept for filing the constitution of a fraternal benefit society which provides for the expulsion of members who refuse to follow the observance of certain trade union principles.

2. The invocation of such a provision against a member of a fraternal society is not such an illegal act as to be the cause for the forfeiture of the charter of the society.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

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OPINION No. 441

*Liability insurance—Property held in trust—Responsibility for payment of premiums—Restatement, Trusts (1935)—Secs. 247, 265—Act of May 15, 1933, P. L. 565.*

A fiduciary may charge against the funds of any estate under his management, premiums for public liability insurance purchased in respect to real estate held in such trust. The Secretary of Banking, as receiver of a fiduciary institution, may charge the particular estates under his administration with insurance premiums for public liability insurance purchased in respect to real estate held in each such trust.

Harrisburg, Pa., November 20, 1942.

Honorable John C. Bell, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: We are in receipt of your recent request for an opinion concerning the maintenance of liability insurance on property held in trust. Specifically you inquire as follows:

1. May a fiduciary charge against the funds of a particular estate administered by it premiums for public liability insurance purchased in respect to real estate owned by such estate?

2. May the Secretary of Banking, as receiver of a fiduciary institution, charge against the funds of a particular estate administered by him as receiver of such institution premiums for public liability insurance purchased in respect to real estate owned by such estate?

To answer these questions we must first ascertain upon whom falls the liability for torts committed by a trustee in the course of the administration of the trust.

The rule is set forth in the Restatement, Trusts (1935), Sec. 265, as follows:

The trustee as holder of the title to the trust property is to personal liability to third persons, at least to the extent to which the trust estate is sufficient to indemnify him.

This rule is qualified as follows:

It is not intended to express any opinion on the question whether the trustee is personally liable as holder of the title to the trust property where the trust estate is insufficient to indemnify him, and where the trustee was in no way at fault in incurring the liability and was not responsible for the insufficiency of the estate to indemnify him.

Pennsylvania decisions are cited in Restatement, Pa. Annot. (1939), Sec. 265, to support the foregoing proposition as follows: *Fidelity v. Bergson*, 328 Pa. 545, 196 A. 28 (1938); *Pennsylvania Company v. Bergson*, 307 Pa. 44, 159 A. 32 (1932); *Bunting v. North Philadelphia Trust*, 120 Pa. Super. Ct. 419, 182 A. 656 (1936); *Preston Retreat v. Porter*, 120 Pa. Super. Ct. 82, 182 A. 64 (1935).

These cases have to do with the liability of the registered owner for local taxes on real estate. But in principle they do support the Restatement rule.

In *Prager v. Gordon*, 78 Pa. Super. Ct. 76, 79 (1921), a case involving injury to a tenant on real estate held in a trust, Judge Trexler writes:

"Was the trustee individually liable for negligence in his representative capacity?" It seems to be well settled that the personal representative is liable in his individual liability for torts committed by him. For any cause of action arising through the negligence of an executor or trustee in managing an estate such executor or trustee is personally liable, and the action must be brought against him in his individual capacity. \* \* \*

We think it free from doubt that there is a personal liability on a trustee for torts committed in the administration of the trust. Whether upon a recovery he may reimburse himself from trust assets or pay

damages out of trust assets is another question. Here we can concede the proposition that where a trustee is personally guilty of tort in the administration of the trust, he cannot shift the response in damages from himself to the estate. However, we still have the situation where the trustee may be held liable for the torts of his agents, servants and employes under the doctrine of respondeat superior. In such cases may he pay a judgment from trust assets, or having himself paid, recoup from trust assets?

On this subject the Restatement, Trusts (1935), Sec. 247, comment a, states as follows:

a. Reimbursement and exoneration. The trustee is personally liable to third persons for torts committed by him in the course of the administration of the trust (see section 264). If the liability was incurred in the proper administration of the trust and the trustee was not personally at fault in incurring the liability, he is entitled to indemnity out of the trust estate. If he has discharged the liability out of his individual property, he is entitled to reimbursement out of the trust estate; if he has not discharged the liability, he is entitled to exoneration out of the trust estate, that is he can properly use trust property in discharging the liability.

We find a dearth of authority in Pennsylvania for the above quoted proposition, and we find no Pennsylvania cases which hold or infer that a trustee *may not* reimburse himself from trust assets where the trustee incurred liability for a tort of which he was personally not guilty. In summary, therefore, we may say that the situation which obtains is that a trust estate may very well be held ultimately liable to loss for tort where the trustee was not personally at fault, but is called upon to answer for the wrongful acts of his agents or others in the administration of the trust. We think it reasonable to assume that in the first expression on the subject our Pennsylvania Courts may follow the Restatement rule, *supra*.

The wise and cautious trustee will protect his trust against such possibility of loss. And if he does so by obtaining liability insurance the cost of it should fall upon the trust estate.

In an interesting article on this subject to be found in the July, 1942, edition of Trusts and Estates, The Journal of Capital Management, published by Fiduciary Publishers, Inc., Henry Pirtle, Trust Officer of the Cleveland Trust Company, discusses the situation of the law and concludes:

From the foregoing it would seem that a trust company could be justly criticized for not procuring public liability insurance in a reasonable amount of protection against judgments for damages in tort recovered by third persons, because in some states at least the trust estate as well as the trustee

may be held liable for his torts; that even where the trustee alone is liable to suit, he may well be entitled to reimbursement from the trust and therefore the insurance should be taken for the protection of the trust. The insurance being for the benefit of the trust estate, the premium cost is a proper expense to be paid from the trust estate. See *Prudential Ins. Co. v. Land Estates, Inc.*, 31 Fed. Supp. 845; *In re Stewart's Will* (1939), 9 N. Y. Supp. (2d) 315; *In re Luther's Will*, [(1930) 243 N. Y. Supp. 366].

We adopt the reasoning set forth above for it may well become the law of Pennsylvania. A trustee is not only without fault when he obtains insurance against the possibility of loss, as above outlined, but he has a distinct obligation to obtain such insurance and charge the trust funds under his administration with the premium.

In purchasing liability insurance the trustee must act with reason and prudence. He may not procure insurance excessive in amount, nor should he obtain an inadequate coverage. In any event, the particular facts and circumstances in each trust should be taken into consideration. In the case of protection against liability arising through the administration of real estate in a trust it would seem advisable for the trustee to carry a blanket policy if he is administering more than one trust and charge the premium proportionately.

What is said hereinbefore applies with particular force to the trust institutions under your supervision and it would seem that your examiners would have no occasion to criticize any institution of this character for expending funds of any trust estate under its management, for premiums on insurance to protect the assets of the estate from what is commonly referred to as public liability.

Your second question treats with the responsibility of trust estates under the management of the Secretary of Banking for the payment of liability insurance premiums. This presents a little different situation than the one heretofore discussed, although the Secretary in possession of a trust institution is subject to the same liability as would be the corporation in the performance of its fiduciary functions.

Section 802 of the Department of Banking Code, Act of May 15, 1933, P. L. 565, Art. VIII, 71 P. S. 733, et seq., reads in part as follows:

B. The secretary, when in possession of an institution as receiver, shall have all the rights, powers, and *duties* which such institution had in its fiduciary capacity. He shall have title to all the assets, \* \* \* In pursuance of this power, the

secretary may institute any action at law or in equity, or execute and sign any written instruments, which the institution itself could have instituted, executed, or signed. (*Italics ours.*)

Furthermore, the Secretary, under the foregoing section of the Banking Code, has the same right to purchase liability insurance as had the defunct fiduciary.

A trustee usually is one who serves by reason of his appointment and his acceptance of the trust. Such fiduciary need never serve against his will. This is forcibly demonstrated by a not uncommon situation. A., the owner of unproductive real estate burdened with excessive taxes would search far and wide to find a trustee willing to accept the trust, the corpus of which would comprise solely that real estate.

On the other hand, the Secretary of Banking does not have the same privilege of rejecting the trust accorded the ordinary fiduciary. When a trust company comes into his hands he is obliged under the law to take that trust company's place as fiduciary for the trusts which the company was managing. He may not refuse any of them but must accept the bad along with the good. In fact, what actually happens is that substituted trustees are soon found in the good estates. The unprofitable and unproductive estates remain with the Secretary of Banking. But it is just in such unproductive estates with dilapidated buildings that liability for tort is most prone to arise.

We think as heretofore said that the ordinary trustee has the right to insure against public liability for tort committed by his agents and others and charge the premiums to the trust estate or estates under his management. Obviously then the Secretary of Banking who serves as fiduciary from the cessation of activities of the defunct fiduciary until the appointment of a substituted fiduciary, and cannot refuse so to serve, has even more reason to protect himself and the trusts from a response in damages to torts, as above outlined.

In view of the foregoing, it is our opinion and you are accordingly advised:

1. That a fiduciary may charge against the funds of any estate under his management, premiums for public liability insurance purchased in respect to real estate held in such trust.

2. The Secretary of Banking, as receiver of a fiduciary institution, may charge the particular estates under his administration with insurance premiums for public liability insurance purchased in respect to real estate held in each such trust.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

RALPH B. UMSTED,  
*Special Deputy Attorney General.*

ORVILLE BROWN,  
*Deputy Attorney General.*

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OPINION No. 442

*State employes joining WAVES, WAACS, Ordnance Battalions covered by Act of June 7, 1917, P. L. 600—Those joining Army Specialist Corps not.*

Commonwealth employees who enter the Women's Army Auxiliary Corps, and the Women's Reserve of the Naval Reserve, enter the military or naval service of the United States, or a branch or unit thereof, within the meaning of the Act of June 7, 1917, P. L. 600, as amended, *supra*. Commonwealth employees who enter the Army Specialist Corps do not come within the meaning of said act. Commonwealth employees who become members of Ordnance Battalions being organized by affiliation with the National Automobile Dealers Association come within the meaning of said act when such battalions are ordered into active military service as a unit of the Army of the United States.

Harrisburg, Pa., November 24, 1942.

To all Departments, Boards and Commissions:

Sirs: This department has had numerous requests from the various departments of the Commonwealth government to advise them whether the Army Specialist Corps; the Women's Army Auxiliary Corps (commonly called the WAACS); Ordnance Battalions organized by affiliation with the National Automobile Dealers Association; and the Women's Reserve of the Naval Reserve (commonly called the Women's Auxiliary Volunteer Emergency Service—the WAVES), or any of them, are part of the military or naval service of the United States, or any branch or unit thereof, within the meaning of the Act of June 7, 1917, P. L. 600, as amended June 25, 1941, P. L. 207; April 21, 1942, Sp. Sess. P. L. 50; and May 6, 1942, Sp. Sess. P. L. 106, 65 P. S. §§ 111-113b.

The Act of June 7, 1917, P. L. 600, as amended, *supra*, provides in part in section 1 thereof:

That whenever any appointive officer or employe, regularly employed by the Commonwealth of Pennsylvania in its civil service, or by any department, bureau, commission, or office thereof, or by any county, municipality, township, or school district within the Commonwealth, shall in time of war or contemplated war enlist, enroll, or be drafted in the military or naval service of the United States, or any branch or unit thereof, he shall not be deemed or held to have thereby resigned from or abandoned his said office or employment, nor shall he be removable therefrom during the period of his service, but the duties of his said office or employment shall, if there is no other person authorized by law to perform the powers and duties of such officer or employe during said period, be performed by a substitute, who shall be appointed by the same authority who appointed such officer or employe, if such authority shall deem the employment of such substitute necessary \* \* \*

The Army Specialist Corps was created by Executive Order No. 9078 of the President of the United States on February 26, 1942. That order reads in part as follows:

By virtue of the authority vested in me by section 1753 of the Revised Statutes of the United States (U. S. C., title 5, sec. 631) by the Civil Service Act (22 Stat. 403), as amended, and as *President of the United States, and for the purpose of obtaining the temporary services of certain qualified civilian employees for the War Department, it is ordered as follows:*

1. There is hereby established in the War Department, under the supervision and direction of the Secretary of War, a corps of uniformed civilian employees to be known as the Army Specialist Corps, hereinafter referred to as the Corps. The Corps shall consist of such number of qualified persons, whether or not theretofore upon any civil-service register, as may be appointed to positions therein from time to time by the Secretary of War: Provided, that no position shall be included in the Corps which ranks below Grade P&S-2 or Grade CAF-7 established by the Classification Act of 1923, as amended, except by agreement between the War Department and the United States Civil Service Commission.

2. The appointment, assignment, supervision, promotion, regulation, and discharge of members of the Corps shall be in accordance with regulations to be prescribed from time to time by the Secretary of War.

3. \* \* \*

4. Payment of expenses authorized by an act, entitled "An Act to provide for uniformity of allowances for the transportation of household goods of civilian officers and employes when transferred from one official station to another for permanent duty," approved October 10, 1940 (54

Stat. 1105), shall be allowed and paid for persons appointed or employed under the provisions of this order when such payment is specifically authorized or approved by such administrative official of the War Department as the Secretary of War may designate to perform such function in his stead and behalf.

5. The responsibility of recruiting persons for the Corps is hereby vested in the Civil Service Commission, which is authorized to exercise such function in conformity with the provisions of this Order without regard to the Civil Service Act and the Rules and Regulations promulgated thereunder. Persons appointed to positions in the Corps shall not thereby acquire a classified civil-service status.

6. Any person occupying a position, other than a temporary position, in the government of the United States, its territories or possessions, or the District of Columbia, may, with the consent of the head of the department or establishment in which he is employed, be transferred or appointed to a position in the Corps, and shall during the period of employment therein be deemed to be on leave of absence without pay from such position, but shall, upon application within forty days after termination of employment in the Corps, be restored to such position or to a position of like seniority, status, and pay without loss of seniority, retirement benefits, or other benefits. (*Italics supplied.*)

On March 24, 1942, the War Department promulgated Army Specialist Corps Regulations (Tentative). Section I, 3, of the Regulations, is as follows:

3. OBJECTIVES.—The objectives of the Corps are as follows:

a. To bring under the control of the Secretary of War certain skilled individuals who have the required professional, technical, or scientific qualifications to enable them to perform duties of certain military personnel, thereby relieving such military personnel for combat and command duties.

b. To supply all arms and services and other agencies of the War Department with individuals possessing certain professional, scientific, technical, and administrative skills.

c. To train such persons whose educational background qualifies them to receive technical training in such scientific or professional field wherein the demand for trained personnel exceeds the supply.

d. To utilize the services within the District of Columbia on a temporary or part-time basis as consultants of such scientists, specialists, and others as the Director General may authorize.

Section II, 16, of the Regulations is as follows:

16. Leaves of absence.—a. The members of the Corps are entitled to the same leaves of absence, including sick leave, *as are provided for other civilian employees of the Government* by the acts of March 14, 1936 (49 Stat. 1161; 49 Stat. 1162), as amended by the act of March 2, 1940 (54 Stat. 38), and any regulations prescribed pursuant thereto.

b. Leaves of absence without pay may be granted for any period by the Director General. (*Italics supplied.*)

Paragraph 18 of Section II provides that members of the Corps will exercise administrative and supervisory functions only. Paragraph 23 forbids issuance of arms or ammunition to members. Paragraph 25 excludes members of the Corps from National Service Life Insurance; and Paragraph 26 provides that death or injury is covered by the Employees' Compensation Act of September 7, 1916, as amended, and regulations of the U. S. Employees' Compensation Commission. Section VI, 51, stipulates that members of the Corps shall wear an "emblem, sleeve, noncombatant."

Nowhere in Executive Order No. 9078, *supra*, does it say that the Corps is a branch or unit of the U. S. Army or the military service of the United States. Nor does it so say in the Regulations, *supra*. On the contrary the Order and the Regulations indicate clearly the contrary: that the Corps is a civilian organization modeled upon and uniformed similarly to the U. S. Army. The Order itself recites the purpose of the creation of the Corps to be the obtaining of the temporary services of *certain qualified civilian employees* for the War Department. We conclude that the Army Specialist Corps is not a part of the military service of the United States, or a branch or unit thereof, within the meaning of the Act of June 7, 1917, P. L. 600, as amended. On July 3, 1942, the Attorney General of New York also held that state employees entering the Corps were not in the military service of the United States within the meaning of the New York Military Law, a statute somewhat similar to ours.

As of November 4, 1942, all appointments in the Corps ceased and all officers thereof within the continental limits of the United States whose applications for appointment in the Army of the United States are not received on or before December 1, 1942, will be honorably discharged December 31, 1942. In short, the Corps will cease to exist as a separate organization and will be absorbed by the Regular Army. Except as to those employees of the Commonwealth who entered the Army Specialist Corps prior to November 4, 1942, the question is, therefore, moot. In so far as those employees of the Commonwealth who did enter the Corps prior to November 4, 1942, are concerned, such persons are not eligible to claim the benefits of the Act of 1917.

The Act of Congress of July 30, 1942, Public Law 689—77th Congress, Chapter 538—2d Session, created the Women's Reserve as a branch of the Naval Reserve. The Naval Reserve is "a component part of the United States Navy." 34 U. S. C. A., Section 751. It is to be noted that Section 505 of the Act of July 30, 1942, *supra*, provides that members of the Women's Reserve are not to replace civil service personnel in the Naval Establishment, but are to be used to release *male officers and enlisted men* of the naval service for duty at sea. The Women's Reserve, or the WAVES, therefore, are part of the U. S. Naval Service within the meaning of the act of 1917.

The Act of May 14, 1942, Public Law 554—77th Congress, authorized the creation of the WAACS, the Women's Army Auxiliary Corps, for noncombatant service with the Army of the United States to make available to National defense the knowledge, skill and special training of American women. Pursuant to said act, the President on May 15, 1942, established the WAACS by Executive Order No. 9163.

Section 12 of the Act of May 14, 1942, *supra*, provides in part as follows:

The corps shall not be a part of the Army, but it shall be the only women's organization authorized to serve with the Army, exclusive of the Army Nurse Corps. \* \* \*

The organization of the Corps separately from the Army is not the decisive factor in whether or not the Corps constitutes a branch or unit of the United States military service. The Act of June 7, 1917, does not specify service in the Army of the United States; it specifies service in the military or naval service of the United States, or any branch or unit thereof. The fact that the Corps is noncombatant is also not the decisive factor, for the Army Nurse Corps is likewise a noncombatant service, but it is a part of the medical department of the Army. 10 U. S. C. A., Section 161.

The Corps is not organized under civil service authority, as is the Army Specialist Corps. It is organized under a special Act of Congress, as was the Women's Reserve organized under an amendment to the Naval Reserve Act. Nor were the WAACS formed to procure the "temporary services of certain qualified civilians for the War Department" as was the Specialist Corps. Section 15 of the Act of May 14, 1942, *supra*, provides that leaves of absence for members of the WAACS shall be the same as those for members of the Army of the United States. This is in contrast to the provisions relating to leaves of absence for the Specialist Corps, which are to be the same as "*other civilian employees.*" (*Italics supplied.*) Also, the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, includes the Women's

Army Auxiliary Corps within the term "persons in military service"; and the National Defense Act, as amended, includes within the prohibition against unauthorized use of the uniforms of the Army, Navy and Marine Corps, the uniform of the WAACS. We conclude that the WAACS are in the military service of the United States within the meaning of our Act of 1917. It is of interest that the Attorney General of New York ruled on July 7, 1942, that the WAACS were in the military service of the United States within the meaning of the New York military law.

The Ordnance Battalions being organized by affiliation with the National Automobile Dealers Association are to be basically mobile, consisting of technical men with a thorough mechanical background. The officers to be selected will be given approximately one month's preliminary training after which they will recruit non-commissioned officers and privates to complete a battalion. By communication of October 10, 1942, the Adjutant General of the United States informs us that these Ordnance Battalions are units of the Army of the United States *after* being ordered into active military service, and that the personnel thereof, both commissioned and enlisted, will be entitled to the same benefits as men who enlist or are inducted into the Army of the United States. We believe that Commonwealth employees who become members of these Ordnance Battalions are entitled to the benefits of the Act of June 7, 1917, P. L. 600, as amended, when, as and if such battalions are ordered into active military service.

It is our opinion, therefore, and you are accordingly advised, that Commonwealth employees who enter the Women's Army Auxiliary Corps, and the Women's Reserve of the Naval Reserve, enter the military or naval service of the United States, or a branch or unit thereof, within the meaning of the Act of June 7, 1917, P. L. 600, as amended, *supra*; that Commonwealth employees who enter the Army Specialist Corps do not come within the meaning of said act; and that Commonwealth employees who become members of Ordnance Battalions being organized by affiliation with the National Automobile Dealers Association come within the meaning of said act when such battalions are ordered into active military service as a unit of the Army of the United States.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

## OPINION No. 443

*Memorial Hospital, Monongahela—Fire Loss—Disposition of insurance—Commonwealth's lien—Acts of June 9, 1911, P. L. 736; April 29, 1915, P. L. 201.*

If the lien for \$10,000, in favor of the Commonwealth is paid off by the hospital then the checks which are in the possession of the Department of Welfare should be returned to the various companies making them, or, at the option of the Memorial Hospital of Monongahela handed to the State Treasurer for endorsement and delivery to the hospital. If the lien is not paid off and satisfied, then the various insurance companies issuing the checks should be consulted with a view to having them issue in lieu thereof checks to the Commonwealth's sole order totaling the amount of the Commonwealth's lien.

Harrisburg, Pa., December 9, 1942.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: We are in receipt of your request of December 3, for an opinion with regard to the disposition of the fire insurance proceeds of the fire loss at the Memorial Hospital in Monongahela, Pennsylvania.

You state that against property of the Memorial Hospital the Commonwealth has a lien filed August 29, 1916, of \$20,000 against the new hospital building owned by the Monongahela Memorial Hospital Association, comprising lots 68, 69, 70 and 71 in the Bellewood Plan of Lots, and lien filed August 29, 1916, for \$10,000 on the hospital building laundry located on the same lots. Insurance was carried with several companies, paid for by the Hospital Association to protect the interest of the Commonwealth.

As a result of a fire which occurred September 12, 1942, the laundry building, on which the Commonwealth had a \$10,000 lien, and its contents were destroyed to the extent of \$13,207, and checks for the proceeds of insurance thereon, made payable to Memorial Hospital of Monongahela, Commonwealth of Pennsylvania, and Receiver of Alexander and Company, were issued as follows:

Commercial Union Assurance Company, Limited, dated October 14, 1942, on the Irving Trust Company of New York, on Policy No. 200005, in the amount of \$2750;

North British and Mercantile Insurance Co., Limited, dated October 14, 1942, on the Bank of the Manhattan Company, New York, on Policy No. 329351, in the amount of \$2750;

The Continental Insurance Company, dated October 18, 1942, on The City Collection Department, New York Clearing House, on Policy No. 1660, in the amount of \$2000;

Springfield Fire and Marine Insurance Co., dated October 16, 1942, on Third National Bank and Trust Company, Springfield, Mass., on Policy No. 2894, in the amount of \$2000;

Milwaukee Mechanics' Insurance Company, dated October 16, 1942, on Federal Trust Company, Newark, New Jersey, on Policy No. 1160, in the amount of \$2000.

These checks total \$11,500, and you ask what disposition is to be made of them.

The Commonwealth's lien on the destroyed laundry building of \$10,000 was acquired in accordance with the provisions of the Act of June 9, 1911, P. L. 736, 72 P. S. §§ 3484 to 3492, inclusive.

The pertinent portions of that act are here quoted:

All appropriations of money hereafter made by this Commonwealth to any benevolent, charitable, philanthropic, educational, or eleemosynary institution, corporation, or unincorporated association, not wholly supported by this Commonwealth, and not under the exclusive control and management of this Commonwealth, for structures, erections, or other permanent improvements of any kind, shall be a lien as hereinafter set forth on the real estate upon which such structure, erection, or other permanent improvement is to be made.

Such appropriation shall be non-interest bearing liens on said real estate from the date of such entry of said certificates in said dockets, and, in case of public or private sale of such real estate, shall be paid out of the proceeds thereof before any subsequent lien, mortgage, encumbrance, or other charge.

All such institutions, corporations, or unincorporated associations shall have the right to pay the amount of said liens to the State Treasurer, at any time, in full or in partial payments; and it shall be the duty of the State Treasurer to accept the same, and to forthwith transmit to the prothonotary of the respective county aforesaid his certificate, that he has received said payment or payments, and the date of receiving same; which certificate or certificates shall be forthwith filed and kept by said prothonotary with the other records in the case, and a notation thereof, setting forth the respective dates and amounts of such payments, shall be made by him on said dockets and indices, in the proper place; and when it appears that the full amount of said appropriation has been repaid as aforesaid to the State Treasurer, said prothonotary shall mark said lien as satisfied in full upon said dockets and indices, at the proper place. \* \* \*

It is to be noted that the legislature made no provision with regard to liens of this type where fire damage totally or partially destroyed

the realty on which the lien existed; nor evidently was such a situation even contemplated, for there is no requirement that insurance be carried against loss.

That insurance was carried by the Memorial Hospital to protect the interests of the Commonwealth, is a fact. Consequently, this fact, even though dehors the contract under which the money was loaned and the lien acquired, must be considered as binding upon the hospital even though it were not adopted or sanctioned by the Commonwealth until after the fire loss actually occurred.

This is basic Pennsylvania law, enunciated as early as 1848. *Miltenberger v. Beacom*, 9 Pa. 198, See 20 *Vale Penna. Digest*, Insurance Section 580, et seq.

Undoubtedly one of your predecessors in office has adopted or sanctioned the act of insuring for the protection of the Commonwealth's lien prior to the occurrence of the fire loss. At any rate, your present correspondence indicates that you do adopt and sanction the procurement of insurance, which is sufficient to bring the case within the rule above stated and make the insurance proceeds available for the protection of the Commonwealth.

In the circumstances, the Commonwealth is entitled from the insurance proceeds to \$10,000, the amount of its lien. *Peoples St. Ry. Co. v. Spencer*, 156 Pa. 85 (1893); *Abbotsford B. & L. Assn. v. Wm. Penn Fire Ins. Co.*, 130 Pa. Super. 422 (1938).

We find no authority in the law which allows you, or any other department, to release the Commonwealth's claim for \$10,000 against the insurance proceeds until the amount of the Commonwealth's lien is paid in full. To endorse the checks which you have in your possession, before payment of the amount of the lien, or for the State Treasurer or any other State officer to endorse them under these conditions, even though given the most complete assurances that the money when paid would be devoted to rebuilding the demolished premises on which the lien exists, would be tantamount to paying out Commonwealth funds. And that cannot be done except by appropriation of the legislature: Constitution of Pennsylvania, Article III, Section 16.

We realize the harshness of this rule and the obstacles to speedy reconstruction of the fire-damaged premises it may impose; yet we are bound to adopt it and leave amelioration to the legislature where the Constitution of 1874 has placed it. Fortunately, in only a few weeks the General Assembly will be in session. Application for a requisite appropriation can be made when it convenes.

If the Memorial Hospital of Monongahela has sufficient funds available, it can pay off the amount of the Commonwealth's lien and have it satisfied under section 7 of the act of 1911, *supra*. In such case the checks can be endorsed by the State Treasurer and delivered to the hospital or returned unendorsed to the insurance company makers at the option of the hospital.

If the hospital does not have the funds to pay off the lien and cannot acquire them under the Act of April 29, 1915, P. L. 201, 72 P. S. § 4038, *et seq.*, (which, in brief, allows Commonwealth liens of the type of this one, in certain cases to be postponed to subsequent mortgages), or cannot otherwise acquire the requisite funds, then the insurance company issuing the checks for the loss, must be required, either amicably or through appropriate action, to rewrite them so that checks payable to the Commonwealth only will be made in the exact amount for which it has a lien on the destroyed property.

It is our opinion that (1) If the lien for \$10,000, in favor of the Commonwealth of Pennsylvania, is paid off and satisfied under Section 7 of the Act of June 9, 1911, P. L. 736, 72 P. S. § 3490, then the checks which you have in your possession as follows:

Commercial Union Assurance Company, Limited, dated October 14, 1942, on the Irving Trust Company of New York, on Policy No. 20005, in the amount of \$2750;

North British and Mercantile Insurance Co., Limited, dated October 14, 1942, on the Bank of the Manhattan Company, New York, on Policy No. 329351, in the amount of \$2750;

The Continental Insurance Company, dated October 18, 1942, on The City Collection Department, New York Clearing House, on Policy No. 1660, in the amount of \$2000;

Springfield Fire and Marine Insurance Co., dated October 16, 1942, on Third National Bank and Trust Company, Springfield, Mass., on Policy No. 2894, in the amount of \$2000;

Milwaukee Mechanics' Insurance Company, dated October 16, 1942, on Federal Trust Company, Newark, New Jersey, on Policy No. 1160, in the amount of \$2000;

should be returned to the various companies making them, or, at the option of the Memorial Hospital of Monongahela handed to the State Treasurer for endorsement and delivery to the hospital.

(2) If the lien for \$10,000, in favor of the Commonwealth of Pennsylvania, is not paid off and satisfied under section 7 of the act of 1911, *supra*, then the various insurance companies issuing the checks above described, should be consulted with a view to having them issue in lieu thereof checks to the Commonwealth's sole order total-

ing the amount of the Commonwealth's lien. In the event of the failure of the companies or any of them to accède to demand in accordance herewith, the matter should be submitted to this department for appropriate action.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

RALPH B. UMSTED,  
*Special Deputy Attorney General.*

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